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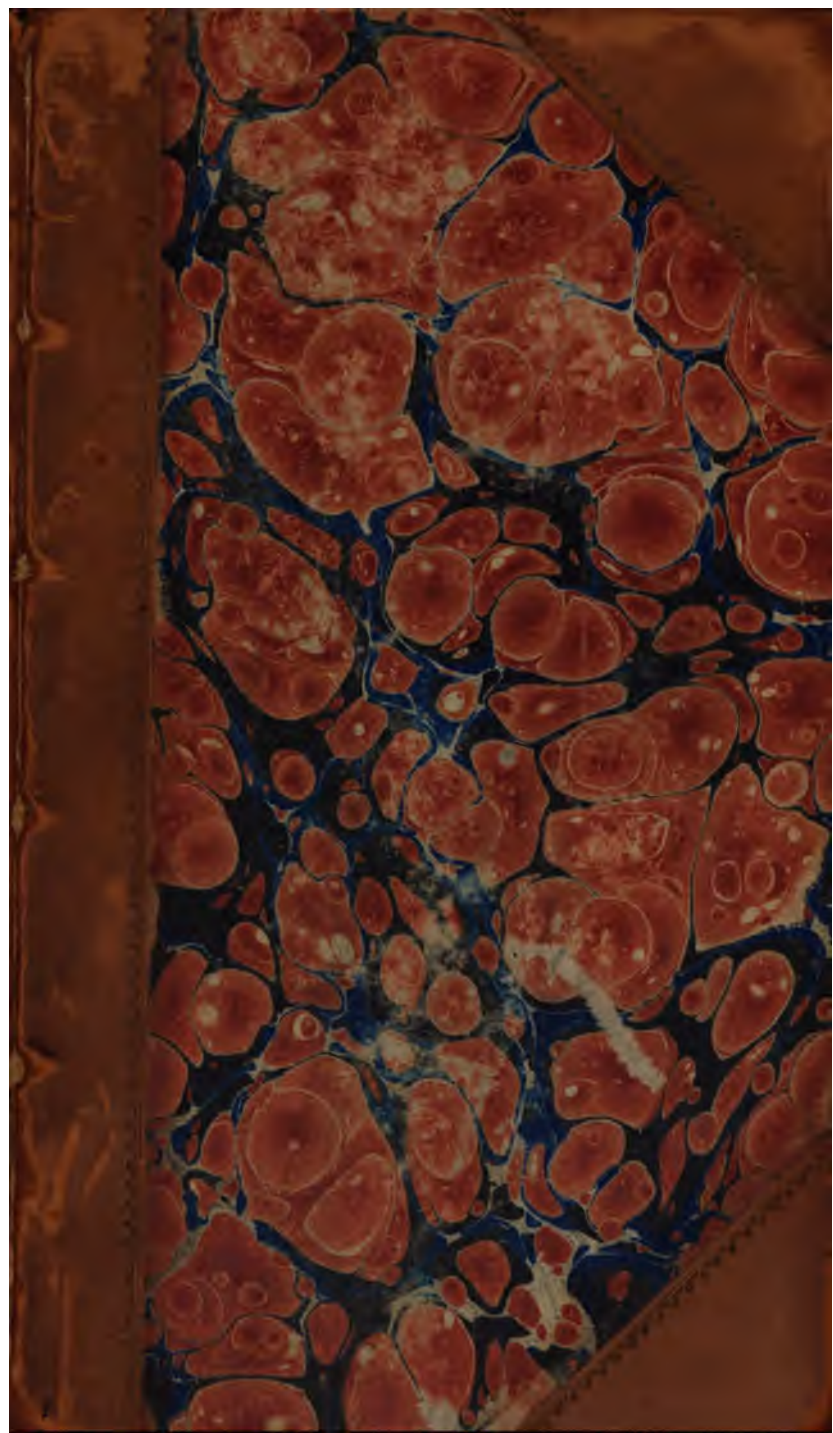
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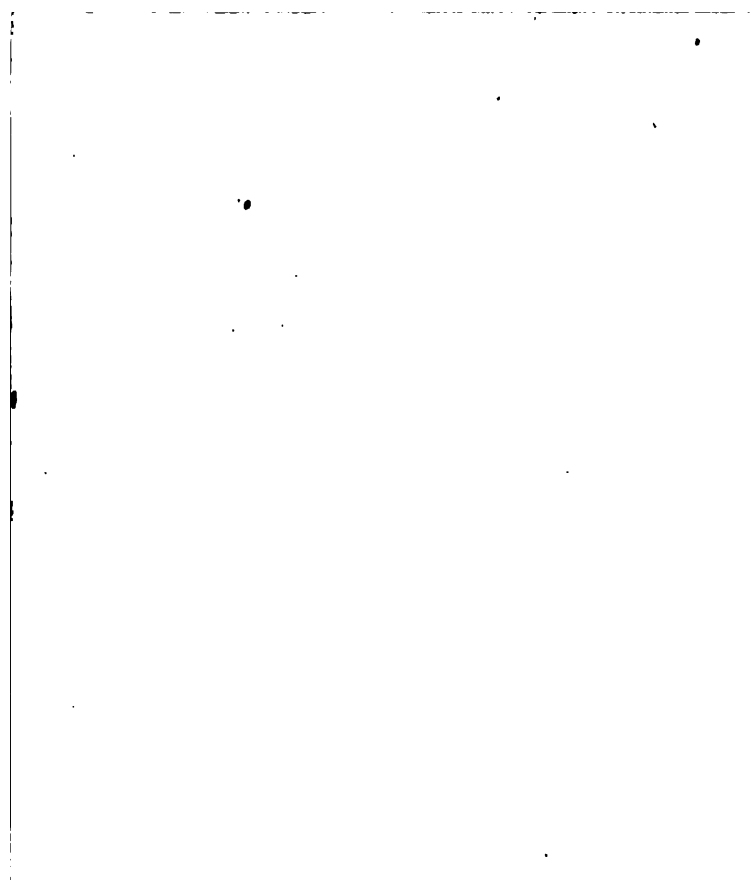
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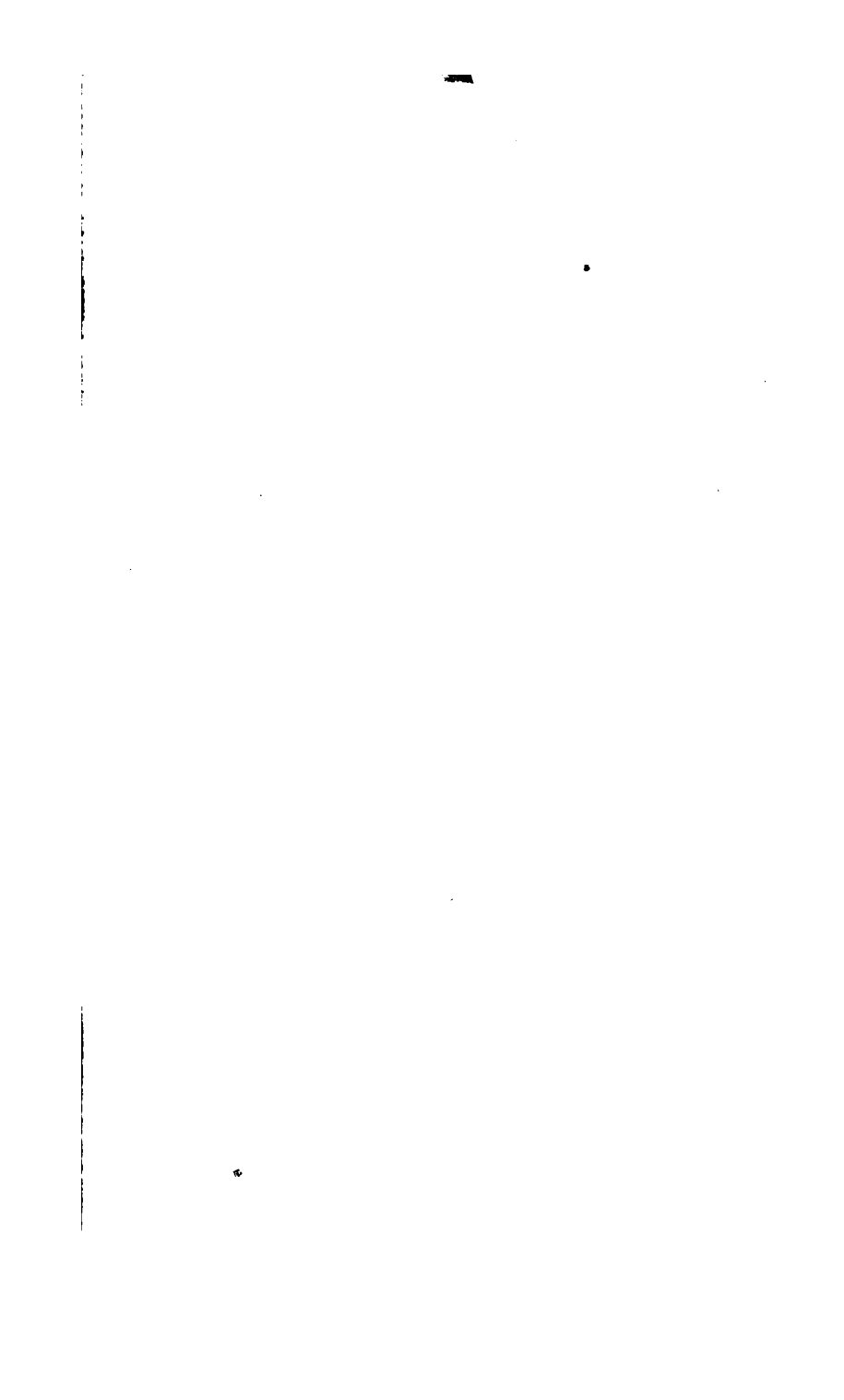
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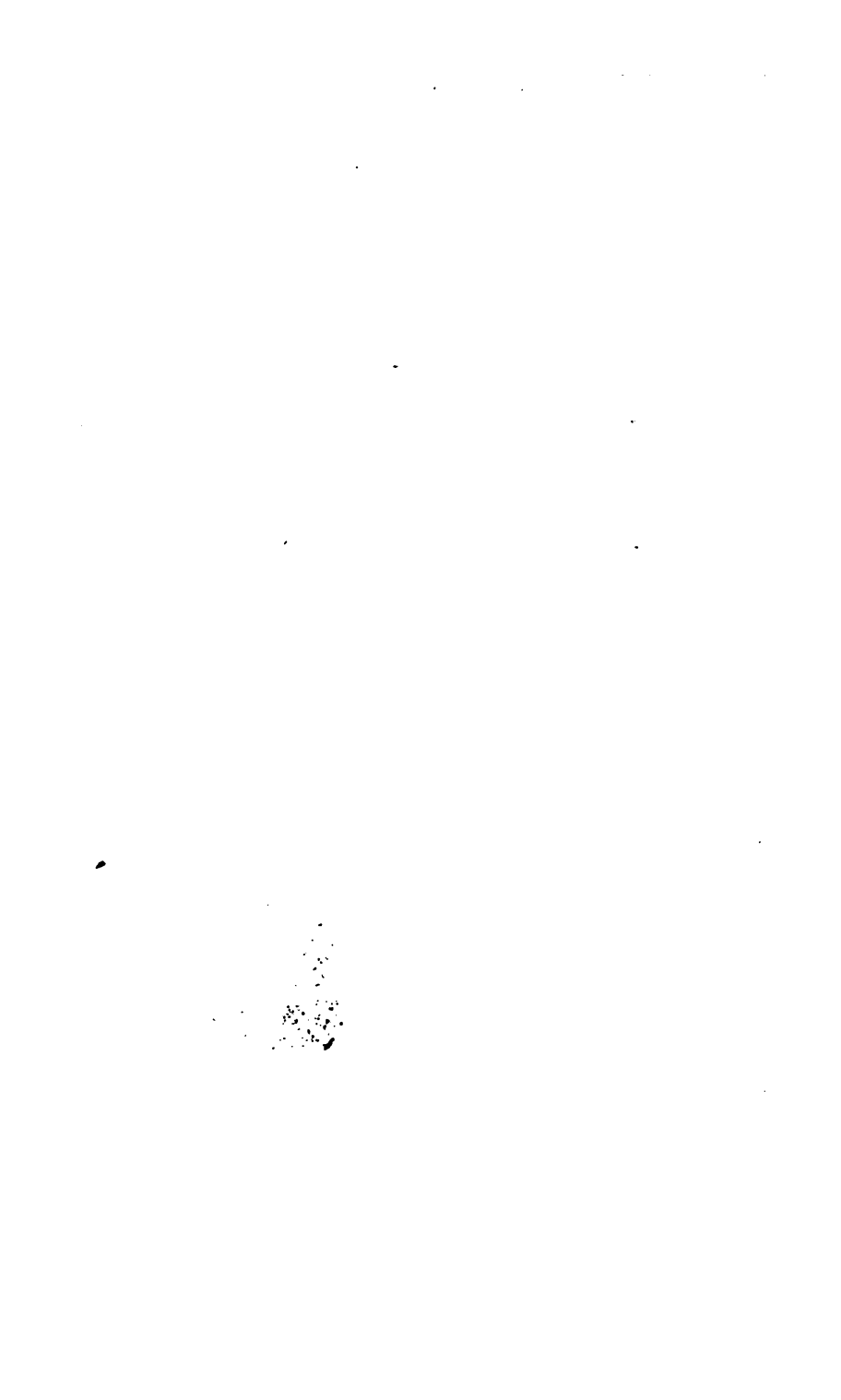
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A
MANUAL
OF
THE LAW OF EVIDENCE,
ON THE
TRIAL OF ACTIONS,
AND OTHER PROCEEDINGS,
IN
The New County Courts.

BY
JAMES EDWARD DAVIS, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.



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TO

HENRY GREENING, ESQ.

MY DEAR SIR,

It may be deemed a want of discrimination in an author to DEDICATE to a Special Pleader, a work having for its basis a Statute, one of the chief features of which is to sweep away the whole system of Pleading in cases within its operation; but, having your permission to do so, I cannot refrain from thus connecting your name with my trifling labours, as a slight acknowledgment for past instruction and continued friendship towards

Your former Pupil,

JAMES EDWARD DAVIS.

1, **ELM COURT, TEMPLE,**
12th July, 1848.



P R E F A C E.

AMONG the numerous treatises on the recent Statute establishing the County Courts, it is remarkable that not one of them is devoted to the subject of the present work, namely, the evidence applicable to the various actions within the jurisdiction of these Courts, and the proofs essential for the parties to adduce in support of their respective claims.

The fact may perhaps be accounted for by the belief, that as these Courts do not interfere with the general rules of evidence in the superior courts, the works on the law of evidence and *nisi prius* in those courts are applicable to the new tribunals. Although such a notion is correct to a certain extent, a great portion of that law has become inapplicable to proceedings in the County Courts.

In the superior courts, the evidence with which a plaintiff must be prepared, always depends upon the pleadings in the particular case, and therefore a considerable part of the existing treatises on evidence, is devoted to the consideration of what facts a party *must* or *may* give under certain pleas. Actions in the County Courts being carried on without the form of pleadings, this portion of each work not merely becomes superfluous, but leaves uncertain what facts are

requisite for a plaintiff to prove where, as on trials in the County Courts, there is no particular issue previously raised between the parties.

Again: the subdivision, in the superior courts, of rights and remedies, into actions of assumpsit, debt, case, &c., arising from the various kinds of writs by which actions in those courts are commenced, is unnecessary and inapplicable in the County Courts, and should therefore be avoided. Nevertheless it is retained in most if not all the treatises on the practice of these Courts; an error arising probably from the language of the Act of Parliament which gives jurisdiction to the County Courts in all pleas of personal actions, to a certain amount, meaning, however, that these Courts shall have jurisdiction in all cases which in the superior courts are the subject of actions of that class.

On the other hand, with one exception, the rules of evidence in the County Courts are the same as in the superior courts, and the plaintiff can only recover a demand or damages in the former by such legal evidence or proof of the facts, in the same manner as would sustain his claim in the latter. The exception alluded to, is the provision that in the County Courts the parties to the suit and their wives are competent witnesses to prove the necessary facts. This distinction neither arises from, nor is necessarily involved in, the construction or mode of operation of those Courts, but is to be regarded as an experiment which, if found to work well, may, at no very distant day, be extended to all courts, and is indeed nothing more than the carrying out to its full extent the principle, that any

supposed interest or bias on the mind of a witness shall not exclude his testimony, but that his evidence is to be received, subject of course to any inference or doubt derived from the knowledge that it is that of a prejudiced party.

With these impressions on the author's mind, he availed himself of the suggestion of a friend, that a work on evidence adapted to the County Courts might prove acceptable; and accordingly he now presents this little Manual, hoping that it may be found useful, although he fears that his attempt has been but imperfectly carried out.

To claim originality for anything beyond the arrangement and design of such a work, would be as absurd, as it would be affected to disclaim the assistance of treatises of established reputation bearing upon the same subjects. The author has made use of many such works, but more especially those of Mr. Phillips and Mr. Roscoe on Evidence; of Mr. Selwyn and Mr. Archbold on *Nisi Prius*, and, above all, Mr. Chitty's Treatise on Contracts, to each of which repeated reference is made in the following pages.



CONTENTS.

PART I.

ACTIONS ON CONTRACTS.

CONTRACTS FOR THE SALE OF GOODS, &c.

GOODS SOLD AND DELIVERED—WHERE SUPPLIED BY THE PARTY SUING TO THE PARTY CHARGED.—EVIDENCE FOR THE PLAINTIFF.—EVIDENCE FOR THE DEFENDANT—Infancy—Coverture—Partnership between Plaintiff and Defendant—Fraud—Illegality—Credit not expired—Non-joinder of Partners—Want of jurisdiction—Payment—Tender—Set-off—Statute of Limitations—Release—Higher security—Judgment recovered—Another Action pending—Bankruptcy of Defendant—Insolvency of Defendant—Bankruptcy of Plaintiff—Insolvency of Plaintiff—Payment into Court.—EVIDENCE WHERE GOODS SUPPLIED BY THIRD PARTY—By Agent—By one of two or more Partners.—EVIDENCE WHERE GOODS SUPPLIED TO THIRD PARTY—To Servant—To Carrier—To Agent—To Partner—to Wife—To Infant.—ACTION BY ADMINISTRATOR OR EXECUTOR FOR GOODS SUPPLIED BY INTESTATE OR TESTATOR.—ACTIONS AGAINST ADMINISTRATORS OR EXECUTORS—Evidence for the Plaintiff—Evidence for the Defendant.—ACTIONS BY ASSIGNEES OF BANKRUPTS.—ACTIONS BY ASSIGNEES OF INSOLVENTS.—GOODS BARGAINED AND SOLD—ACTION FOR THE PRICE—Evidence for the Plaintiff—Evidence for the Defendant.—ACTION FOR NOT ACCEPTING—ACTION FOR NOT DELIVER.

**ING—ACTIONS FOR BREACH OF WARRANTY OF GOODS—
Warranties in general—Warranty of Horses.—Action on
CONTRACT FOR THE RECOVERY OF GOODS.**

**CONTRACTS FOR THE USE OF GOODS, AND THE
OCCUPATION OF PREMISES, &c.**

**ACTIONS FOR RENT—Evidence for the Plaintiff—Evidence for
the Defendant.**

ACTIONS RELATING TO PERSONAL SERVICES.

**WORK AND LABOUR—Evidence in general—Evidence for the
Plaintiff in an Action for Wages—Evidence for the Defendant
—Actions by Apothecaries and Surgeons—Action by an
Attorney.**

**CONTRACTS RELATING TO MONEY AND
SECURITIES FOR MONEY.**

**WHERE NO WRITTEN SECURITY—Money Lent—Money Paid—
Contribution—Money Had and Received—Balance of Part-
nership Account—Distributive Share or Legacy—Account
stated.—ACTIONS ON WRITTEN SECURITIES—PROMISSORY
NOTES—Payee *v.* Maker—Indorsee *v.* Maker—Indorsee *v.*
Indorser.—BILLS OF EXCHANGE—Payee *v.* Acceptor—
Indorsee *v.* Acceptor—Drawer *v.* Acceptor—Payee *v.* Drawer
—Indorsee *v.* Drawer—Indorsee *v.* Indorser.—ACTIONS ON
CHEQUES—INTEREST—ACTIONS ON GUARANTEES.**

PART II.

ACTIONS FOR TORTS.

INJURIES TO THE PERSON.

**WILFUL AND INTENTIONAL INJURIES—Assault—False Impri-
sonment.—INJURIES ARISING FROM NEGLIGENCE OR CARE-**

LESSNESS—Negligence in general—Negligent Driving—
Keeping Dangerous Animals.

INJURIES TO PROPERTY.

ACTIONS FOR KEEPING POSSESSION OF PROPERTY—For taking
Goods—For detaining Goods.—ACTIONS FOR INJURIES
ARISING FROM NEGLIGENCE—Negligent Driving—Keeping
Dangerous Animals—Negligence by Bailees—By Carriers—
By Innkeepers.

PART III.

ACTIONS OF REPLEVIN—PROCEEDINGS TO
RECOVER POSSESSION OF TENEMENTS—
INTERPLEADER CLAIMS.

REPLEVIN.

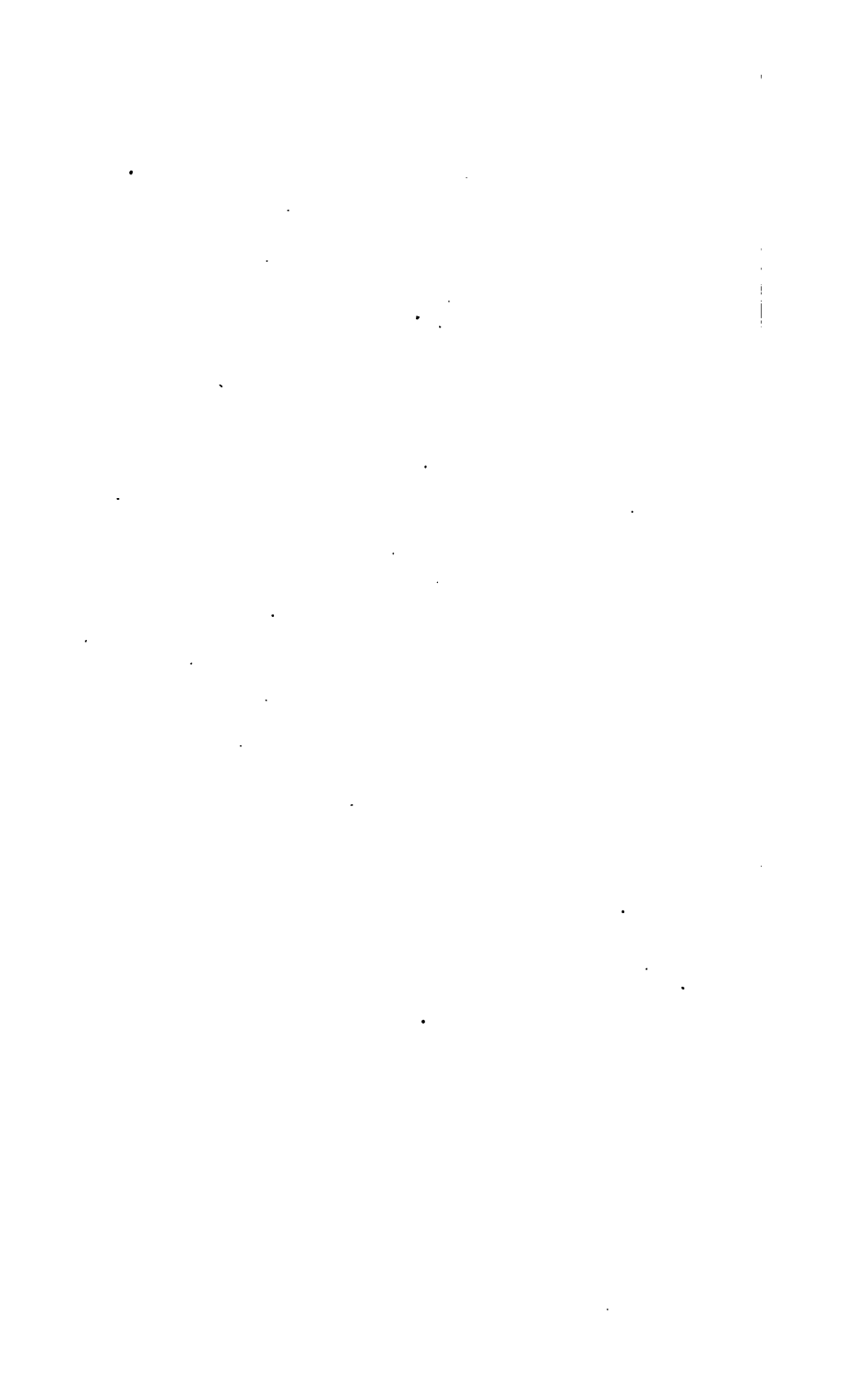
Evidence for the Plaintiff—For Defendant—Distress for Rent—
Distress Damage Feasant.

RECOVERY OF POSSESSION OF TENEMENTS.

Evidence for the Landlord—Evidence for the Tenant.

INTERPLEADER CLAIMS.

Claim by Landlord—By Third Party.



THE LAW OF EVIDENCE,

§c. &c.

THE 9 and 10 Vict. c. 95, which establishes the New County Courts, enacts "That all pleas of personal actions where the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise, may be holden in the County Court, without writ, but the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

The practical effect of the Statute in respect of actions brought in the New Courts, is to abolish the division of actions into "assumpsit," "debt," "trover," "case," &c., (forms used in actions brought in the superior courts, and even there of little utility), and to allow of a more rational and simple classification of proceedings.

The Rules framed by the Judges for the practice of the County Courts recognize two classes of actions: *Actions on Contracts* and *Actions for Torts*. The first comprises all actions arising out of any contract, either expressly made between the parties, or implied by law from the circumstances of the case; and the other comprises actions brought by one party against another for some wrong or injury, for which the law provides a civil remedy or compensation, independently of any previous contract or agreement between the parties.

This is a simple and natural division, but one which must be carried out still further, for the great variety of transactions falling under one or other of the above heads, admit of, and require subdivision.

The first class, or actions on contracts, may be subdivided into four groups. I. Actions relating to contracts for the sale of goods, &c. II. Actions relating to contracts for the use of goods; and the occupation of premises, &c. III. Actions

relating to personal services; and, IV. Actions relating to money and securities for money.

The second class, or actions for torts, may be subdivided into two groups. I. Actions for injuries to the person, either wilful, or arising from negligence; and, II. Actions for injuries to property, personal and real.

There are, however, certain proceedings given by the County Courts Act, which it will be more convenient to consider independently of the above arrangement; namely, Actions of replevin; Proceedings to recover possession of small tenements; and Interpleader claims.

It is obvious, that although the actions in the New County Courts are divested of the technicalities arising from the "forms" of action, and the complicated system of "*pleadings*," a plaintiff or defendant in the New Courts must establish his claim by proof of certain facts, varying according to the particular circumstances of each case; and that the nature, amount, and manner of this proof, or *evidence*, must be subject to certain rules, founded on reason and convenience, and the provisions of the Legislature, and established by the decisions of the Judges of the Courts of Law.

Many of these rules of evidence are necessarily applicable to circumstances arising in various kinds of actions, while others are confined to the particular nature of the proceeding. It is, however, a more convenient and practical arrangement to state the general as well as particular rules under one or other of the kinds of action to be considered—illustrating those of a general application under the actions in which they are most likely to arise.

PART I.

ACTIONS ON CONTRACTS.

CONTRACTS FOR THE SALE OF GOODS, &c.

EVIDENCE IN AN ACTION FOR THE PRICE OF GOODS SOLD AND DELIVERED.

- § 1. *Where the Goods were supplied by the party suing, to the party sought to be charged.*
- § 2. *Where Goods were supplied by third party, agent, or partner.*
- § 3. *Where Goods were supplied to third party, servant, carrier, agent, partner, wife, or child.*
- § 4. *Where Goods supplied by intestate or testator—action by administrator or executor.*
- § 5. *Where Goods supplied to intestate or testator, action against administrator or executor.*
- § 6. *Actions by assignees of bankrupts and insolvents.*

OF THE NECESSARY EVIDENCE FOR THE PLAINTIFF, WHERE THE GOODS ARE SUPPLIED BY THE PARTY SUING TO THE PARTY SOUGHT TO BE CHARGED.

The plaintiff in an action for the price of goods sold and delivered must be in a condition to prove,—1, The contract of sale, express or implied; 2, The delivery of the goods; 3, The value or price.

The contract of sale, where there is no express agreement in writing.—In the most simple case of where goods are in fact supplied to the party against whom the action is brought, there will be no difficulty in proving the above points in evidence. The plaintiff will merely have to prove that the goods were delivered, and their value; for in general, proof of the delivery of the goods to, and the receipt of them, by the defendant, is evidence of the contract, and supersedes the proof of an order; *Bennett v. Henderson*, 2 Stark., 550; in other words, the plaintiff will not be obliged to prove that the defendant actually ordered the things—for where the goods are delivered to the defendant in person, the order

or request to be supplied with them, and the delivery, form in fact one transaction. The above rule, therefore, applies to the ordinary case of the delivery of goods at the defendant's residence, when, if they are taken in and kept, it will be presumed that the goods were previously ordered and required. In that case, therefore, the first of the above requisites, viz., the contract of sale, is *implied* by actual proof of the second—the delivery.

The delivery of the goods.—A party cannot maintain this action unless he has delivered the goods to the defendant. And if the agreement was that the goods should be delivered 'at the defendant's house or elsewhere, a delivery in accordance with such agreement or understanding must be proved.

Where A agreed to sell to B certain goods and earnest was paid, and the goods were packed in cloths furnished by B, and deposited in a building belonging to A, till B should send for them; A declaring at the same time that they should not be carried away till he was paid; it was held that this was not such a delivery as to entitle A to maintain an action for goods sold and delivered. *Goodall v. Skelton*, 2 H. Bl., 316. So, where goods, sold for ready money, were packed up in boxes of the vendee, for him and in his presence, but remained at his request on the premises of the vendor, it was held that an action for goods sold and delivered would not lie. *Boulter v. Arnott*, 1 C. & M., 333. In the above cases the action should be for goods *bargained* and sold, or for not accepting. *See post*, p. 13. The objection in the above cases is rather to the form of the plaint than to the right to maintain an action. Those cases in which some act has to be done by the plaintiff to complete the right to sue at all, are considered under the head of *Goods bargained and sold*. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered; because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered. *Oxendale v. Wetherhell*, 9 B. & C., 386. Where the defendant hired a musical snuff-box, on the understanding that if it was damaged he was to retain and pay for it; on its being so damaged, it was held that the plaintiff might bring an action for goods sold and delivered for the price. *Bianchi v. Nash*, 1 M. & W., 545.

If goods are taken in on the terms of their being returned if not approved of, and they are retained an unreasonable time, the party so taking and retaining may be sued for goods sold and delivered. *Beverley v. Lincoln Gas Co.*, 6 A. & E, 829; *Percival v. Blake*, 2 Car. & P., 514. When goods have been sent on a contract for sale, but they do not correspond with the sample contracted for, the mere unpacking of them by the vendee will not, under any circumstances, amount to an acceptance, *Curtis v. Pugh*, 16 Law J. Q. B., p. 199. A contract to deliver means a delivery at usual and convenient hours. Thus an offer to deliver several tons of oil at an unseasonable hour of the night, was held not to satisfy a contract to deliver, generally, within a certain number of days. *Startup v. Macdonald*, 2 M. & G., 395. If the delivery deviates from the mode pointed out by the buyer, yet if notice is sent to him, and he does not repudiate it, he is liable. *Richardson v. Dunn*, 2 Q. B., 218; *Rescoe*, 6th edit., p. 272; and see post, *Defence*, as to the effect of the quality of the goods varying from the order.

Delivery of goods. Acceptance within the Statute of Frauds.—Where goods above the value of 10*l.* have been sold, and there is no note or memorandum in writing, and no earnest has been given, it frequently becomes a question whether or not there has been a sufficient acceptance of the goods, or of part of them within the Statute of Frauds, 29 Car. II., c. 3, s. 17, which enacts, that no contract for the sale of any goods, wares, and merchandize, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

Lord Tenterden's Act, 9 Geo. IV., c. 14, s. 7, enacts that the above provision of the Statute of Frauds shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

As we are now considering the evidence in an action for goods sold and delivered, where there was no agreement or contract in writing between the parties, the only part of the

Statute affecting such a state of circumstances, is that requiring an acceptance and receipt by the buyer of at least part of the goods so sold.

It is to be observed that an act may be equivalent to a delivery, though not amounting to an acceptance under the Statute of Frauds. *Farina v. Home*, 16 *Law J. Ex.*, p. 73; and, on the other hand, some things may amount to an acceptance within the Statute, which do not amount to an acceptance in an action for goods sold and delivered. By *Patteson, J., Curtis v. Pugh*, 16 *Law J., Q. B.*, p. 200. The questions, however, are often identical. In order to satisfy the Statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intention of taking to the possession as owner. *Phillips v. Bistolli*, 2 *B. & C.*, 513. Acceptance without a delivery is insufficient. Thus, where the defendant ordered the goods to be marked, and to be sent to a certain place, but the plaintiff had not parted with them so as to deprive him of his lien for the price, the sale was held insufficient. *Bill v. Bament*, 9 *M. & W.*, 36. Bulk samples were sent to the defendant by coach pursuant to the contract, but he returned them as not answering to the samples by which he bought; the jury in an action for the price of the goods, found that the samples *did* answer the contract; but it was held that there was no acceptance of the goods within the Statute of Frauds. *Johnson v. Dodgson*, 2 *M. & W.*, 653.

There is not a sufficient acceptance, so long as the buyer continues to have a right to object either to the quantum or the quality of the goods. *Hanson v. Armitage*, 5 *B. & Ald.*, 559; *Smith v. Surman*, 9 *B. & C.*, 561. And it seems that though the purchaser has used (in the opinion of a jury,) more of the goods than was necessary for the purpose of trying experiments to ascertain if they were of proper quality, that does not amount to an acceptance. *Elliott v. Thomas*, 3 *M. & W.*, 170. So where A agreed to purchase a horse from B for ready money, and to take him within a time agreed upon, and about the expiration of that time A rode the horse (by way of trial,) and gave directions as to its treatment, &c., but requested that it might remain in B's possession for a further time, at the expiration of which he promised to fetch it away, and pay the price; these circumstances were held not to constitute an acceptance. *Tempest v. Fitzgerald*, 3 *B. & Ald.*, 680. And where a horse was sold, and no time fixed for payment, and the horse was to remain with the vendors for twenty days without

any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors, it was held that there was no acceptance. *Carter v. Tous-saint*, 5 B. & Ald., 855.

A. went to the shop of B. & Co., and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.*, a separate price for each article was agreed upon. A. marked some with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away: a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and, therefore, within the Statute of Frauds; and that there was no acceptance of the goods to take the case out of that Statute. *Balday v. Parker*, 2 B. & C., 37.

Where A employed B to construct a wagon, and while it was in B's yard unfinished, A employed a third person to fix upon it some iron work, and a tilt; it was held that this did not amount to an acceptance; but per Tindal, C. J. it might have been otherwise if these Acts had been done after the wagon was completed. *Maberley v. Sheppard*, 10 Bing., 99. The traveller of A in London having called upon B in the country for orders, B gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price; the traveller said the price was too low, but he would write to his principal, and if B did not hear from him in one or two days he might consider that his offer was accepted. A never wrote to B, but sent all the goods; it was held that this was not a joint order for all the goods, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also within the Statute. *Price v. Lea*, 1 B. & C., 156.

The circumstances in the following cases were held to constitute an acceptance within the Statute. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away: it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 193. The defendant bought two horses from the plaintiff, a livery stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and changing the stables in which the horses had been kept, to his livery stables, had relinquished his lien, and that there

was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 *Taunt.*, 458. Wool bought by the defendant was removed to the warehouse of a third person M, by his direction, and weighed and packed for him; this was held an acceptance, though the course of dealing was that it should not be taken out of M's warehouse till payment. *Dodsley v. Varley*, 12 *A. & E.*, 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiff by the defendant, debiting himself with the price, are evidence of an acceptance by the defendant. *Edan v. Dudfield*, 1 *Q. B.*, 302. A bargained for a horse then in a stable, and soon afterwards brought in a third person, and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*; it was held that it ought to be left to the jury to say whether this was or was not a delivery and acceptance. *Blenkinsop v. Clayton*, 7 *Taunt.*, 597; and see *Phillips v. Bistolli*, 2 *B. & C.*, 511. Where the purchaser of goods at the time of sale wrote his own name upon a particular article, Lord Ellenborough ruled that, if his purpose was to denote that he had purchased it, and to appropriate it to his own use, it was a sufficient acceptance within the Statute. *Hodgson v. Le Bret*, 1 *Camp.*, 233; *Anderson v. Scot*, *ib.*, 235, (n); but see *Baldey v. Parker*, 2 *B. & C.*, 37, *ante* p. 7.

When the goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by what is tantamount, such as the delivery of a key of the warehouse in which the goods are lodged, or by delivery of other *indicia* of property. *Per Lord Kenyon, C. J., Chaplin v. Rogers*, 1 *East*, 194.

Delivery of part.—Where A agreed to sell to B twenty hogsheads of sugar then in bulk, and filled up and delivered four, and afterwards filled up the remaining sixteen, and gave notice to the defendant, who said he would take them away as soon as he could, this was held equivalent to an actual acceptance of the sixteen hogsheads. *Rolide v. Thwaites*, 6 *B. & C.*, 388. When a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole under this section. *Elliott v. Thomas*, 3 *M. & W.*, 170. The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance; but otherwise, where it is a sample merely, and forms no part of the bulk. *Talver v. West, Holt, N. P. C.*, 178; *Cooper v. Elston*, 7 *T. R.*, 14; *Hinde v. Whitehouse*, 7 *East*, 558.

As the Statute of Frauds only applies to the sale of goods where the price amounts to 10*l.*, it may be observed that where the amount is less than 10*l.*, the necessary evidence of delivery is to be considered independently of that Statute, and as treated of *ante* p. 4.

The price or value.—Where the goods have been sold without any agreement as to the price, their value must be proved. *Roscoe*, 6*th* edit. p. 281. If the vendor of goods is only able to prove the delivery of a package without any evidence of the contents, it will be presumed as against him that it was filled with the cheapest commodity in which he deals. *Chunnes v. Peasey*, 1 *Camp.*, 8.

In ordinary actions for goods sold, proof that the price charged to the defendant was the selling price at the time of sale, will be sufficient; so the proof that the defendant had on former occasions paid the same price for identical articles will be evidence, provided the article is not one of fluctuating value.

If a seller agrees to sell a machine at a certain price, and puts in materials superior to those contracted for, the purchaser is neither bound to pay a higher price nor return the machine. *Wilmot v. Smith*, 3 *C. & P.*, 445.

Mode of proof.—As the Act 9 & 10 *Vict.*, c. 95, s. 83, empowers the parties themselves and their wives to be examined, the plaintiff, if he supplied the goods himself, or was present at any part of the transaction, may give evidence, and there is no doubt that in such case he *ought* to do so, and if the facts to which he can speak are clear and undisputed, and are sufficient in other respects to establish his case, there will be no occasion to give other evidence; but upon any facts which are likely to be disputed by the defendant, the plaintiff should be prepared with such additional and confirmatory evidence as lies in his power to produce. The plaintiff may call his wife to prove any fact, but of course any evidence given by himself or her upon facts disputed by the defendant, is open to the observation that it is given by an *interested* party. A shopman or servant will in this respect be a better witness than a wife.

It is in the power of the plaintiff to call the defendant, or the defendant's wife, as a witness; but it is seldom that it will be actually necessary for the plaintiff to do so, and, for obvious reasons, he will not in general be inclined to rely on their testimony to support his own action. In some cases, however, to be hereafter noticed, their evidence becomes material.

The 6 & 7 *Vict.*, c. 85, renders all persons competent wit-

nesses, so that no objection can now be taken that the witness is interested or otherwise incompetent.

Nature of evidence—must not be “hearsay.”—The evidence given by the witness must in general be of some act or fact affecting the defendant, and it is necessary that the plaintiff and his witnesses should distinctly understand that what is generally termed “hearsay” evidence is inadmissible. When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, states the language of others which he has heard, he offers what is called *hearsay* evidence. In its legal sense, it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information. *Phillips, 9th edit., vol. i., p. 184.*

The general rule of evidence is, that hearsay reports of transactions, whether verbal or in writing, given by persons not produced as witnesses, are not receivable. For example, a plaintiff cannot give in evidence that his wife, or son, or servant, or other party, told him that the defendant came and bought goods, or did or said so and so. There are many reasons why this is not evidence, but the most obvious are, that it would be very unfair that the defendant should be affected by anything said in his absence, and that the fact repeated can be proved, if true, by the party present.

Another ground upon which evidence is rejected on account of its being hearsay is, that such evidence requires credit to be attached to a statement made by a person who is not subjected to the ordinary test enjoined by the law for ascertaining the correctness and completeness of testimony;—the author of the statement not delivering his evidence subject to cross-examination in the presence of a Court of Justice, and not speaking under the moral and political sanctions of an oath; his character and motives not being investigated, his deportment not being observed. *Phillips, 9th edit., vol. i.*

Statements and admissions of the defendant.—What the defendant has said at the time of the purchase or delivery of the goods, or at any time subsequently, is evidence against him, as much as any *acts done* by him, bearing in mind that the evidence as to this must also be direct and not “hearsay,” or in other words, that it must be proved by the party who himself heard the defendant. The principle on which the admission of a party to the suit, is

received in evidence, is founded chiefly on the reasonable presumption in favour of the truth of a statement, when it is against the interest of the person who makes it. *Phillips*, 9th edit., vol. i., p. 339.

Admissions stated to be made without prejudice, but with a view to a compromise, and in order "to buy peace," are not evidence of a debt by way of admission against the maker. *Phillips*, vol. i., p. 348; *Buller's Nisi Prius*, 236. But an offer of a specific sum, by way of compromise, is evidence, unless accompanied with a caution that the offer is confidential, or without prejudice. *Wallace v. Small*, *M. & M.*, 446. It is generally considered that an admission made *without prejudice* is not receivable, on the ground of policy, in protecting such confidential overtures. *Phillips*, 9th edit., vol. i., p. 348, *Note* 2. Where a communication without prejudice had taken place between the attorneys of the plaintiff and defendant, and the plaintiff's attorney three months afterwards called on the defendant to explain why an earlier answer was not given to a proposition made in the course of the prior communication, it was held that the evidence of what passed on the second occasion was inadmissible. *Collins v. Wright*, cited *Phillips*, 9th edit., vol. i., p. 348.

On the subject of admissions, it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together. This is necessary in order to enable the Court to judge of the true meaning and extent of the admission, which when taken entire, will often have a different import from that which a partial account might convey. Therefore, if part of a conversation is given in evidence against a party as an admission, he is entitled to have the whole conversation repeated. *Phillips*, 9th edit., vol. i., p. 340. If a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by him in the same conversation, not only so much as may explain or qualify the matter introduced upon the previous examination; but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. *By Lord Tenterton, delivering the opinion of the Judges in the Queen's case. 2 Br. & Bing.*, 298.

Statements made in the presence of the defendant.—

Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made; on this ground it is that the statements of any one in the presence and hearing of the party against whom they are offered, are evidence. *Roscoe, 6th edit., p. 38. Phillips, 9th edit., vol. i., p. 354.*

The evidence of admissions by a defendant, and of statements made in his presence, is of course to be regarded rather as confirmatory of something previously proved by the plaintiff, or of which he has at least given *some* evidence, than as in itself establishing a distinct fact. In an action for goods sold and delivered, now under consideration, the plaintiff should not rely altogether on a subsequent admission of the defendant, however clear and distinct it might be to establish his claim, but should give some evidence of the original transaction with which the Judge or the jury may connect the subsequent admission. And with respect to verbal admissions in general, it may be observed that they ought to be received with a great deal of caution. It may be a correct principle that the statement of a person to the prejudice of his own interest is so far entitled as to be admissible in evidence against him. Still the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may probably not have correctly expressed his meaning. This meaning, if correctly expressed, may have been misunderstood; a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement. *Phillips, 9th edit., vol. i., p. 372.*

In the superior courts, a count on *an account stated*, is generally added to a declaration for goods sold and delivered, but a plaintiff scarcely ever recovers upon evidence on that count alone. It only assists imperfect proof on the other or main counts. It would not be of any practical use in actions in the County Courts to insert in the summons a claim on an account stated, for it is clear a plaintiff may give evidence of any admission or acknowledgment in the nature of an account stated, in support of a claim for goods sold and delivered.

Admission by payment.]—As the simple *offer* of a sum of money is evidence against a defendant, so the actual payment of money on account is an admission of the existence of a debt; thus if money is paid on account of a bill previously delivered, and nothing is said as to the amount of the bill, there is no doubt that such payment would be evidence of the defendant's assent to the correctness of the bill delivered.

As to effect of payments into Court, see *post*, *Defence*.

In this action a portion of the plaintiff's evidence frequently consists of memoranda, entries in day-books, pass books, and letters; but as this class of evidence will be more conveniently considered in connexion with the law relative to those cases where there has been a written agreement between the parties, the reader is referred to that head, *post* p. 15.

Evidence must be confined to statement in summons, and to particulars of demand.]—The Statute 9 and 10 Vic., c. 95, which establishes the County Courts, enacts that no evidence shall be given by the plaintiff on the trial of any cause, of any demand, or cause of action, except such as shall be stated in the summons. Sec. 75.

The summons must state "the substance of the action."

From the form of the plaint book it appears that the very general statement of "for goods sold" is sufficient, under which a plaintiff would of course be entitled to prove for goods bargained and sold, or for goods sold and delivered, or for both.

As, however, the plaintiff is required, when he seeks to recover a sum exceeding 5*l.*, to deliver a statement of the particulars of his demand or cause of action, and as such statement ought undoubtedly to show clearly the precise nature of the action, the plaintiff will, in all cases exceeding 5*l.*, be more confined in his proof, for he will be precluded from giving any evidence of demands not contained in it. Thus, where the particular states a demand for horses sold by the plaintiff to the defendant, evidence cannot be given of money due from the defendant for horses sold by him as the plaintiff's agent. *Holland v. Hopkins*, 2 B. & P., 243. Proof that the defendant acknowledged that he owed the plaintiff 13*l.* 10*s.*, will not support particulars "To a beast sold and delivered 13*l.* 10*s.*" *Breckon v. Smith*, 1 A. & E., 488.

The use of particulars is to prevent the inconveniences which might otherwise arise from the general and undefined statement in the summons, and to apprise the defendant of the particulars of the demand which the plaintiff has against him. If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it may be in some respects inaccurate. *Phillips*, 9*th* edit., vol. i., p. 490. A mistake in the particulars, not tending to mislead, is immaterial. *Roscoe*, 6*th* edit., p. 56. Particulars in which the plaintiffs claim for goods sold as *brewers*, will not prevent their recovering as *spirit dealers*, where the

defendant has not been misled. *Lambirth v. Roff*, 8 Bing., 411. The materiality of the variance is a question for the Judge. *Roscoe*, 6th edit., p. 57.

Although the statement of particulars confines the plaintiff's evidence to the causes of action mentioned in the particulars, yet if the defendant in giving evidence for himself gives evidence also for the plaintiff of some claim not included in the particulars, the plaintiff as to that claim is no longer confined to the particulars, but may avail himself of the defendant's evidence. *By Parke B., Fisher v. Wainright*, 1 M. & W., 486.

It is a fatal variance if it appear in evidence that a party who ought to be joined as plaintiff, has been omitted in the summons, but where the action is against one person, and it appears that one or more other persons were jointly answerable with the defendant, this is no variance, 9 & 10 Vict. c. 95, s. 68, neither was it before the statute.

Interest.]—Under certain circumstances the plaintiff may recover interest on the amount due to him for goods sold and delivered, although not claimed in the particulars of demand.

The Act 3 & 4 Will. IV., c. 42, empowers a jury to allow interest to the creditor, not exceeding the current rate of interest, upon (amongst other cases) all debts or sums certain (and not payable at a particular time), *from the time, when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.*

Where goods have been sold and delivered to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover in this action, as part of the stipulated price, interest from the time the bill would have become due. *Farr v. Ward*, 3 M. & W., 25.

Of the necessary evidence where there is an agreement in writing.]—In laying down the amount and nature of evidence necessary to support an ordinary action for goods sold and delivered to the party sought to be charged, it has been assumed that the order was either to be implied, or if it was in fact expressly given, that it was so *verbally*; but it will now be necessary to consider the nature of the evidence when the original contract or some portion of the evidence to support it, is in writing.

In general where a contract has been reduced into writing by the parties, the writing is the best evidence of it, and must be produced; for it is a general rule that the best, or rather the highest evidence must be given that the na-

ture of the case admits, *Buller's N. P.*, 293; and in general, parole or verbal evidence is esteemed secondary in its nature to written evidence. *Roscoe*, 6th edit., p. 2.

But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If the narrative of an extrinsic fact has been committed to writing, it may yet be proved by verbal evidence; for where a writing is not the fact itself to be proved, and not made an appropriate instrument of evidence by private compact, nor required by law, there is no reason why it should exclude oral or other evidence. It often happens that an oral communication is accompanied by one in writing to the same effect, yet the oral communication may be received, provided it be adduced, not to prove the contents of the writing and in substitution of it, but as independent evidence. *Phillips*, 9th edit., vol. i., p. 428.

Upon this principle, a receipt for money will not exclude verbal evidence of the payment. *Rambert v. Cohen*, 4 *Esp.*, 213. In the same manner what a party says, admitting a debt, is evidence; notwithstanding the promise to pay is reduced into writing. *Singleton v. Barrett*, 2 *C. & J.*, 369.

Memorandum.]—A mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of verbal evidence. *Doe v. Cartwright*, 3 *B. & A.*, 326; and see *Hawkins v. Warne*, 3 *B. & C.*, 698. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but not signed by the vendee, the terms of the contract may be proved by parol. *Dalison v. Stark*, 4 *Esp.*, 163.

A variety of cases show that a mere unaccepted proposal, executory memorandum, private minute, or unauthorized entry, will not exclude oral proof. *Vide Roscoe*, 6th edit., p. 3. Although an entry by a plaintiff in his day-book of goods supplied to the defendant, is no *proof* of the sale or delivery, and would not be admitted in evidence in an action in the Superior Courts, yet in the County Courts, as the plaintiff may be examined in an action there, a tradesman ought to produce his books, to show that the goods were duly entered at the time, as *confirmatory* of his claim, and if the entry is not in his handwriting, the party making it should be called.

Memorandum made by a party since deceased, in the course of his business.]—In an action for beer sold and delivered, in order to prove the delivery, a book was put in, containing an account of the beer delivered by the plaintiff's dray-

men, and which it was the duty of the draymen to sign daily. The drayman who had signed the account of beer delivered to the defendant being dead, the book was admitted in evidence, on proof of his handwriting. *Price v. The Earl of Torrington, Salkeld*, 285. This decision falls within the class of cases thus described by Mr. Justice Taunton: "A minute in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence." *Doe v. Duford*, 5 B. & Ad., 898. Mr. J. Parke, in delivering his judgment in the same case, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed, that in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made, it is admissible. But in the other case, it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry."

An entry admissible after the maker's death, because made in the course of business, is, however, evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter. *Smith's Leading Cases*, 2d edit., vol. i., p. 140.

Agreement must be produced.—If it appears in the course of the plaintiff's case, that there is an agreement or other instrument in writing which ought to be but is not produced, the plaintiff will be nonsuited; but if the plaintiff succeeds in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant cannot by producing the contract, succeed in nonsuiting the plaintiff, unless the contract contained terms or stipulations shewing that the plaintiff was not entitled to maintain his action, as that there were conditions precedent unperformed or unfulfilled by him.

Where it appears that there is a written instrument which ought to be produced, it is no answer that the instrument required a stamp and has not got one, or has one of an improper denomination; for no secondary evidence can be given of an instrument requiring but not having a stamp; and in such a case the plaintiff must be nonsuited. *Vide Slatterie v. Pooley*, 6 M. & W., 664.

Agreement cannot be varied by verbal evidence]. Where

there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations *previous to*, or *contemporaneous with*, the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract. *Phillips, 9th edit.*, vol. ii., p. 358. "By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract." *Per Lord Denman, C. J., Goss v. Lord Nugent, 5 B. & A. 64.* The reason is, that it would be very inconvenient that matters in writing, made on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by the averment of the parties, to be proved by the uncertain testimony of slippery memory. *By Lord Coke, 5 Rep. 26*, and see *Phillips, 9th edit.*, vol. ii., p. 357. Parol evidence is inadmissible to alter the legal construction of a written agreement. *Roscoe, 6th edit.*, p. 11. Thus where an agreement for the sale of goods was silent, as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held, that parol evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin, 3 Camp., 426; Halliley v. Nicholson, 1 Price, 404.* So where the written agreement was to take goods on board a ship "forthwith," parol evidence to show that they were to be received on board in two days was not allowed. *Simpson v. Henderson, M. & M., 300.*

If a party signs an agreement in his own name, he cannot afterwards defeat an action on it by proving that he signed only as agent for another. *Mages v. Atkinson, 2 M. & W., 440; Jones v. Littledale, 6 A. & E., 486.* But in an action on a written contract between the plaintiff and B, parol evidence is admissible on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B, not on his own account, but as agent of the defendant. *Wilson v. Hart, 7 Taunt., 295; 1 B. Moore, 45 S. C.*

When a contract is made for the sale of goods, and the bargain has been reduced into writing, pursuant to the 17th

section of the Statute of Frauds, parol evidence would not be admitted to show, that the parties agreed to vary the quantity of goods to be delivered. If the time for the delivery of the goods is stipulated, and fixed by the contract, a verbal alteration of the time would be an alteration of the written contract; and from the decision in *Goss v. Lord Nugent*, 5 B. & Ad., 58, it seems to follow, that a written contract for the sale of goods, within the Statute of Frauds, varied by an oral stipulation as to the time of delivery, (or any other material particular) could not now be enforced at law. *Phillips*, 9th edit., vol. ii., p. 362.

Subsequent alteration.] There is no doubt that where a contract, not subject to the control of the Statute of Frauds, or any other Act of Parliament, has been reduced into writing, it is competent to the parties at any time before the breach of it, by a new contract not in writing, altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it. *Goss v. Lord Nugent*, 5 B. & Ad., 658. Thus, in an action by an auctioneer for the price of a dressing-case sold by auction for less than £10, and described in the printed catalogue as having silver fittings, whereas, in fact, they were only plated, it was held that the plaintiff might give in evidence declarations made by him at the time of the sale, in the hearing of the defendant, that the catalogue was incorrect in describing the fittings to be silver, and that the dressing-case would be sold as having plated fittings only, though no alteration was made in the catalogue. *Eden v. Blake*, 14 L. J. Ex., 194.

And although a contract required to be in writing by the Statute of Frauds cannot be *varied* by a subsequent verbal agreement, yet as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should seem that a written contract within the Statute may be *waived* and *abandoned* by a new agreement not in writing. *Vide Goss v. Lord Nugent*, *supra*.

Written contract may be explained.] Where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue. It is competent also to receive such explanatory evidence where technical words or peculiar terms are used, or indeed any expressions which at the time the instrument was written, had acquired an appropriate meaning, either generally, or by local usage, or amongst particular

classes. *By Parke B. in Shore v. Wilson, vide Phillips, 9th edit., vol. ii., p. 277.*

Such inquiry does of necessity take place in the interpretation of cases where terms of art or science occur in mercantile contracts, which in many instances are a peculiar language employed by those only who are conversant in trade or commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the court or judge to construe the instrument, and to carry such real meaning into effect. *By Tindal, C. J. S. C.*

But it is to be remembered that the *declarations* of the party himself, as to the sense in which he intended to use the particular term in question, are not receivable in evidence. In applying this last rule to contracts between party and party, it must be confined to the mere secret statements or declarations of the party, and unknown to the other, at the time of the contract. Neither can any kind of extrinsic evidence be admitted, if the party to the instrument has shown, by the language which he has himself used in some other part of the writing, what sense he intended to put upon the term. *Phillips, vol. ii., p. 282.*

To explain a term in a charter-party, proof of its mercantile acceptance and meaning is admissible; as, to explain the term "cotton in bales," *Taylor v. Briggs, 2 C. & P., 525*, or to show that in mercantile transactions *good* barley and *fine* barley signified different things. *Hutchinson v. Bowker, 5 M. & W., 535*. So to explain the words "in turn to deliver," and therefore that a question whether there was any general understood meaning of those words among ship-owners and merchants entering into charter-parties with respect to the commerce then under investigation, was unobjectionable. *Robertson v. Jackson, 15 L. J. C. P. 28*. In *Bowman v. Horsey, (2 M. & R., 85,)* evidence of usage of trade was admitted to explain the terms used in a receipt-bill which had been given by the defendant to the plaintiff, who had sold to a third person goods specified in the bill, and by direction of the buyer sent them to the defendant, sending at the same time the receipt-bill for his signature. The bill was signed by the defendant, and purported that the goods specified were received on

account of the plaintiff for the buyer. The defendant having shipped the goods in the name of the buyer under his order, was sued in an action of trover; and at the trial it was insisted, on the part of the plaintiff, that the receipt-bill must be construed according to the general usage of the trade; and that, although the defendant was to attend to the directions of the buyer, as to *preparing and packing* the goods, yet he was still to hold them subject to the further orders of the plaintiff, and not to part with them without his authority. Lord Abinger held, that there was an ambiguity in the language of the instrument, as it appeared that the defendant was to hold the goods for one person, and yet on account of another; and, therefore, that this case came within the general rule, that upon a mercantile instrument evidence of usage may be given in explanation of an ambiguous expression.

The same rule which admits evidence of custom and usage to annex incidents to written contracts in commercial transactions, extends also to contracts in other transactions of life, wherein known usages have prevailed and been established: this has been allowed, upon the presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract also with reference to those known usages. Thus in an action upon a contract for the sale of a thousand deals, it would be competent to show that the word *thousand* meant, according to the usage and common understanding of the place where the contract was made, something more than it would in its ordinary sense. *Smith v. Wilson*, 3 B. & Ad., 728; *Phillips*, 9th edit., vol. ii., p. 338.

A contract for the sale of cider may be explained by local usage to mean apple-juice before it has been made into cider in its usual form. *Studdy v. Sanders*, 5 B. & C., 628. But in an action on a contract respecting "ware potatoes," it appearing that the term "ware" applied equally to all kinds of potatoes, and meant the best or largest of any kind; it was held that evidence to show a particular sort called "Regent's wares," were intended, was inadmissible. *Smith v. Jeffrys*, 15 L. J., Ex., p. 325. Apparent variances in bought and sold notes may be reconciled by the evidence of brokers. *Bold v. Rayner*, 1 M. & W., 343. So a clerk in the office in which an account was kept was permitted to explain the meaning of a particular item. *Hood v. Reeves*, 3 C. & P., 532. Where instructions were given by a principal residing out of England to his factor to sell corn, a custom in the London corn-market to sell in

the factor's own name is admissible, to explain the instructions. *Johnston v. Usborne*, 11 A. & E., 549. But parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract. *Semble, Cross v. Eglin*, 2 B. & Adol., 106.

Parol evidence to fill up blanks in written contract.—How far a mercantile contract, reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of the general course and usage of the trade to which it relates, is a question which it would be difficult to answer with exactness and precision. *Per Tindal, C. J., Whittaker v. Mason*, 2 Bing. N. C., 369, 370. Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten; as, if the agreement were to deliver goods to the amount of less than 10*l.*, and a blank were left for the quantity of goods to be delivered, in such a case it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to show the quantity for which the parties agreed. *Roscoe*, 6th edit, p. 18, citing *Phill. Ev.* It might indeed be contended that an instrument so imperfect on the face of it, is no contract at all, so as to exclude parol evidence. *Id.*

Stamp.—Any writing amounting to an agreement or other complete instrument requiring a stamp, must be properly stamped, but memoranda, letters, and agreements, made for or relating to the sale of any goods, wares, or merchandize, are exempted from stamp by the statute 55 Geo. III., c. 184, schedule, Part I.

It would be foreign to the purposes of this work to enter into the question of what instruments are within this exemption. Independently of this express exemption, a mere order for goods, or the entry of them, in account books, or a letter acknowledging a debt, does not require a stamp, and these are the most frequent species of written evidence which a party in an ordinary action for goods sold and delivered has to make use of, or deal with.

When however a stamp is necessary, the consequence of the want of it must be stated.

As already observed, an instrument requiring a stamp cannot be produced in evidence without being stamped. When an unstamped instrument in writing has been lost, or destroyed even by the party who objects to the want of the stamp, parol evidence of the contents is inadmissible. *R. v. Castle Morton*, 3 B. & Ald., 588; *Rippiner v. Wright*, 2 B. & Ald., 478.

It has been already stated under the rules relating to written evidence, that if the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence (ante p. 15). So of course wherever verbal evidence may be given under this rule, it matters not whether the writing itself had or had not a stamp. Thus a verbal admission of a debt, and promise to pay it, may be proved though the party at the same time gave an admission, and promise to pay in writing on an unstamped paper, *Singleton v. Barrett*, 2 C. & J., 368; so, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present. *Rambert v. Cohen*, 4 Esp., 213.

Proof of defendant's handwriting.—The simplest and most obvious proof of handwriting is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur, where such a direct kind of evidence cannot possibly be procured. The writing may be secret in its nature, or no person may have been present at the time, or if a person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his handwriting. A witness may therefore be asked whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his handwriting. This course of examination evidently involves two questions; first, whether the supposed writer is the person of whom the witness speaks; and, secondly, if he is the person, whether he wrote the paper in dispute. This kind of evidence may be so weak as to be utterly unsafe to act upon, or so strong as in the mind of any reasonable man to produce conviction. But whatever degree of weight a witness's testimony may deserve—which is a question exclusively for the jury—it is an established rule, that if he has seen the person write, he will be competent to speak to his handwriting.

Witnesses will frequently express the weaker degrees of belief in their minds, by saying they are of *opinion*, or they *think*, that a writing produced is the handwriting of a particular individual. The evidence of a witness, who has seen a person write, and says he thinks a paper is his handwriting, is receivable. (*See Garrels v. Alexander*, 4 Esp., 37.)

Another method of acquiring a knowledge of handwriting is by means of a written correspondence. If a witness has

received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting. The same questions occur here, as have been before mentioned in the case where a witness speaks from having seen the person write ; and in addition to these, one other question arises concerning the identity of the person who wrote the letters; and the admissibility of the evidence must depend upon this, whether there is good reason to believe that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of the paper in question. If this point is clearly proved, the witness who has received the letters will frequently be able to give more satisfactory evidence, than one who has seen the person in the act of writing: for the latter may have seen him write but seldom, or on occasions which were not likely to excite attention, while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves, having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of handwriting.

It is not only by means of written correspondence that a witness's knowledge of handwriting may be acquired. A witness will be allowed to give evidence as to handwriting, when he has formed his belief from having seen letters or other documents purporting to be the handwriting of the party, on the contents of which he afterwards communicated personally with the party, or where he has acted upon them by written answers producing further correspondence, or where the party has acquiesced in some matter, or transacted some business, to which the letters relate, or where the party and the witness have had some other mode of communication, which in the ordinary transactions of life, would induce a reasonable presumption that the letters or documents were the handwriting of the party. *By Pattison J. Doe v. Sackermore, 2 N. & P., 46.*

Letters forming one side of a correspondence may enable others, besides the party to whom they are addressed, to speak to the handwriting contained in them. A clerk who read the letters when received, or the broker who was consulted upon them, is as competent to judge whether a signature is that of the writer of the letters, as the merchant to whom they are addressed. The servant who has habitually carried his master's letters has an opportunity of obtaining a knowledge of his master's writing, though he

never saw him write, or received a letter from him. *By Lord Denman, Doe v. Sackermore*, 2 N. & P., 54. *Phillips*, 9th edit., vol ii., p. 247, 251.

It may be observed however that persons of inferior education, and who are not in the habit of writing much or receiving a variety of written correspondence, are very apt to jump to a conclusion as to the identity of writing. They are incapable of discerning the minute distinctions between the writing of one person and another, and hence much reliance ought not to be placed on their testimony.

Where a witness's belief is founded on acquaintance with handwriting by any of the above means, the evidence will be admissible, though such acquaintance has been confined to a single specimen; nor is there any limit of time defined by the law within which the handwriting which is the foundation of the witness's belief, must have been seen by him. In *Burr v. Harper*, (*Holt's N. P. C.*, 420), the witness's belief was founded on a single specimen, and he was unable to speak to the handwriting, without refreshing his memory at the trial. If the witness is not able to express his belief, as to the writing in question, except by comparing it with the specimen which he produces for refreshing his memory, and can only say, that after comparing the two together, he believes the writing to have been written by the same person, this is clearly not admissible as proof of handwriting.

Where a witness gives evidence of the handwriting of a party whom he has never seen write, the jury must be satisfied that the party, whose handwriting is in dispute, is identified as the person with whose handwriting the witness is acquainted.

The identity, however, may be proved by other persons besides the witness who gives evidence of the handwriting. In a case where the witness had never seen the party whose handwriting he proved, it was held sufficient evidence of identity, that the party lived in the town from which the letters purported to have been written, and that no other person of the same name lived there. *Harrington v. Fry*, *R & M.*, 90.

A witness who has had sufficient means for enabling him to give evidence respecting a person's handwriting, and yet does not retain any distinct impression upon the subject, may be allowed to refresh his memory, at the time of giving his evidence, by looking at a paper from which he has formed his opinion, and which he has kept in his possession; and may then declare his opinion as to the genuineness of the paper in question. *Burr v. Harper*, *Holt's N. P. C.*, 420. In

such a case, not only is there is no direct comparison by juxta-position of writings, but there is little or no danger of an unfair selection of specimens, for they must be confined to such as the witness has become acquainted with in other ways than for the purpose of giving evidence in the cause; the general character of the handwriting has been acquired incidentally and unintentionally; and the question appears to be, whether the evidence of the witness as to the general character of the handwriting is likely to be more satisfactory, when, perhaps, he trusts to a fleeting impression, which, for want of being renewed, has become faint and indistinct, or after he has had an opportunity of restoring his original impressions by an inspection of the papers from which they were derived. *Phillips, 9th edit.*, vol. ii., p. 253. It is very doubtful whether a person, practised in the examination of handwriting, can be called to state his opinion whether a writing is in a feigned or a genuine hand; it is, however, certain that such evidence should have no weight. *Gurney v. Langlands*, 5 B. & Ald., 330; *Doe v. Sackermore*, 5 A. & E., 751. *Roscoe, 8th edit.*, p. 92. See *post*, as to the right of a witness to refresh his memory at the trial.

In the cases which have been before mentioned, the proof of handwriting is founded on the knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But a witness will not be allowed to state to a jury the conclusion or belief of his mind, as to a piece of handwriting being that of a particular individual, where that conclusion is made for the purpose of the issue, by means of a comparison of the disputed writing with another written specimen of the same individual, produced in Court. See the observations upon this subject by the Judges, in *Doe v. Sackermore*, 2 N. & P., 54. By Dallas, Ch. J., in *Burr v. Harper*, *Holt's N. P. C.*, 420. *Stranger v. Searle*, 1 Esp., 14. *Clermont v. Tullidge*, 4 C. & P. *Greaves v. Hunter*, 2 C. & P., 477. *Phillips, 9th edit.*, vol. ii., p. 254.

Within a recent period a rule has been established, which amounts to a considerable relaxation of the strictness of the law, in regard to the direct comparison of handwriting. Upon a question respecting the identity of handwriting, the jury may be allowed to take other papers which have been proved to be the writing of the party whose handwriting is disputed, provided they are part of the proofs in the cause; and may compare them with the

disputed writing, for the purpose of forming their opinion whether the disputed writing is genuine.

It was considered an established qualification of the last-mentioned rule, that documents, irrelevant to the points in dispute, are not to be received in evidence at the trial, in order to enable a jury to institute such a comparison, and that neither could it be permitted to introduce writings, irrelevant to the matters in issue, in order to enable a witness to institute such a comparison. Thus in *Doe v. Perry v. Newton*, 1 Nev. & P., 1, it was held that evidence of handwriting by comparison is inadmissible, except either when the handwriting, acknowledged to be genuine, is already in evidence in the cause, or the disputed writing is an ancient document. (See *Phillips*, 9th edit., vol. ii., p. 256-7; *Griffiths v. Ivory*, 11 A. & E., 322; *Hughes v. Rogers*, 8 M. & W., 123.)

In a later case, however, it was held that if a witness, who is called to disprove the signature of a party, states that he believes the signature is not genuine, and gives as his reason for that belief, the absence or presence of certain peculiarities which he says do or do not exist in the genuine signatures of the party, the opposite counsel may put into his hand a paper unconnected with the cause, and ask if, in his opinion, that contains a genuine signature of the defendant; and if he answer in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities, (as the case may be,) which you have before stated as your reasons that the signature in dispute is not genuine?" and semble, that if the witness says it does not, it would be competent to lay that paper before the jury, that they might judge of that answer. By *Alderson, B.*, after consulting with *Lord Abinger, C. B.*, *Parke, B.*, *Gurney, B.*, and *Rolfe, B.*; *Younge v. Honner*, 1 C. & K., 51.

Some questions have arisen, whether consistently with the previous rules, a witness may speak to handwriting, not from a direct comparison, but from a standard in his own mind, where that standard has been obtained by the inspection of papers which have been shown to him purposely with a view to a particular cause. In the case of *Stranger v. Searle*, 1 Esp., 14, a witness had seen the alleged writer of a disputed signature write several times, but, on his adding, that this was when the defendant had written his name for the purpose of shewing the witness his manner of writing, Lord Kenyon rejected the evidence, on the ground, that the defendant might write differently from his common mode of writing, through design. But where a witness

formed his opinion of the handwriting of a person, from having observed it signed to an affidavit used in the cause upon a motion to postpone the trial, it was held sufficient. *Smith v. Sainsbury*, 5 C. & P., 196. Here the writing was not made expressly with a view to the evidence, though probably the witness might have made himself acquainted with it for the purposes of the trial. *Phillips*, 9th edit., vol. ii., p. 260.

A witness cannot be permitted to form his opinion of the handwriting from extrinsic circumstances, as from his knowledge of the party's character and habits. *Da Costa v. Pym, Peake, Ex., App.*, 85.

Attesting witness.—A general rule with respect to the proof of private writings is, that where an instrument is attested, the attesting witness ought to be produced at the trial to prove it. *Phillips*, 9th edit., vol. ii., p. 201, 202.

As, however, the law with respect to this rule has more frequently to be considered in actions on promissory notes (the signature of the maker of which is very often attested) than in agreements for the sale of goods, the reader is referred to the evidence for the plaintiff in actions on promissory notes.

Secondary evidence.—Where the production of evidence indicates the existence of other evidence of a more original character, still if it can be shewn that the better evidence is not attainable, the principle of the rule, that the highest or best evidence must be given, will not apply. With respect to the proof of documents, it is, in general, permitted to give secondary evidence of them where they are destroyed or lost, or where they are in the possession of an adversary who refuses to produce them. *Phillips*, 9th edit., vol. i., p. 434.

Evidence of a kind inferior to primary, and which necessarily supposes better evidence behind, is called secondary evidence. Such secondary evidence is inadmissible unless a ground be laid for it by satisfactorily accounting for the absence of superior proof. *Roscoe*, 6th edit., p. 3.

When writing in the possession of the defendant.—It very frequently happens that the writing which the plaintiff wishes to give in evidence is in the possession of the defendant. In that case the plaintiff should give the defendant notice to produce the document required, and as he has a right to call the defendant himself as a witness he may also serve him with a summons, with a clause requiring the production of the writing in question. 9 & 10 Vict. c. 95, s. 85. The effect of a notice to produce is that if the defendant does not produce the instrument as required, the plain-

tiff will be entitled to give *secondary* evidence of its contents.

It is to be observed, that this notice will be of no avail as regards third parties. When the document is in the hands of a third party, not under the control of the defendant, the plaintiff can serve him with a summons with the clause above mentioned; but in the case of the non-production of the instrument in compliance with the summons, the plaintiff cannot give secondary evidence of its contents. *Vide Jesus College v. Gibbs*, 1 Y. & Coll., 156. But where a document is in the hands of an attorney who is called to produce it, but declines to do so, relying upon his privilege or upon his lien, secondary evidence of its contents may be given. *Marston v. Downes*, 1 A. & E., 31; *Doe v. Ross*, 7 M. & W., 102. In the last case, it was suggested by the Court, that when the attorney refuses on the ground of privilege, it may perhaps be necessary to shew that his client also objects to the production. *Vide Roscoe*, 6th edit., p. 4.

When writing lost.]—Where secondary evidence is offered in consequence of the destruction or loss of the primary evidence, it must be shown, in order to establish the loss, that diligent search has been made in those quarters from which the primary evidence was likely to be procured. *Roscoe*, 6th edit., p. 4. All the proper sources from which the primary evidence can be procured, must be exhausted before secondary evidence can be admitted. *Id.*, *ibid.* With regard to what shall be deemed to be due inquiry after a document, in order to let in secondary evidence, cases must very much depend on their particular circumstances, especially upon the importance of the instrument, or the usage or practice which may exist respecting the custody of such documents. *Phillips*, 9th edit., vol ii., p. 229.

The general presumption is that a useless instrument will be destroyed. *By Bayley, J. Rex v. Farleigh*, 6 D. & R., 153. Proof by a witness that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in secondary evidence. *Rex v. Johnson*, 7 East, 66; *Kensington v. Inglis*, 8 East, 278, 288. Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction is sufficient. *Per Abbot, C. J. Brewster v. Sewell*, 3 B. & Ald., 296.

Where the party in whose possession the instrument was, is alive, he ought to be called, and his declarations are not admissible. *Rex v. Denis*, 7 B. & C., 620.

EVIDENCE FOR THE DEFENDANT IN AN ACTION WHERE THE GOODS ARE SUPPLIED BY THE PARTY SUING TO THE PARTY BOUGHT TO BE CHARGED.

The defendant has a right to contradict or rebut any of the facts which it is necessary for a plaintiff to establish before he is entitled to a verdict or judgment in his favour.

The three points which a plaintiff has to establish, are 1. The contract of sale expressed or implied. 2. The delivery of the goods. 3. The value or price. *See ante*, p. 3.

The defendant therefore may, where the plaintiff has to prove an express contract or order for the goods, shew that there was no contract or order on his part, or that the goods were not delivered.

To meet the proof of delivery, the defendant may in some cases show that the goods were returned, and were not in fact accepted by him, but this defence will be considered in treating of the defence to actions for goods *bargained and sold*.

Evidence on the part of the defendant as to the third point, viz., the value or price is, of course, generally rather in reduction of the amount claimed by the plaintiff, than tending to defeat the plaintiff's claim altogether, except in those cases in which the defendant has already paid to the plaintiff, or has paid into Court all that he considers the goods were worth or the plaintiff entitled to. The defences of *payment* will be considered presently. *Vide post*, *Payment into Court*.

Where the defendant had ordered of the patentee, a specified patent machine, it was held that it was no defence to an action for the price, to show that the machine had wholly failed in accomplishing the purpose for which it was intended by the defendant, and which it was the expressed object of the patent to effect. *Oliphant v. Bailey*, 13 L. J., Q. B., 34.

The defendant may give the bad quality of the articles in evidence in reduction of the value claimed by the plaintiff. *Basten v. Butler*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp., 38. And though a different practice formerly prevailed, it is now held, that in all cases of goods sold at a fixed price with a warranty, or agreed to be supplied according to a special contract, it is competent for the defendant in this form of action to shew how much less the subject-matter of the action is worth by reason of the breach of warranty or contract; any further damages sustained by the defendant beyond the difference of value must be recovered in a cross action. *Mondell v. Steel*, 8 M. & W.

858. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence, though it may be evidence in favour of the plaintiff of a fresh contract to pay on the footing of a *quantum valebat*. *Ibid.*, S. C., 871; *Groundsell v. Lamb*, 1 M. & W., 352. *Vide Roscoe*, 6th edit., p. 282.

Where the contract contains a clause releasing the plaintiff from all responsibility in respect of the goods supplied after a certain time of trial, the purchaser cannot after the time is passed, prove a latent defect in them in reduction of the price, there being no fraud alleged. *Sharp v. Great Western Railway Co.*, 9 M. & W., 7.

Having considered the evidence that the defendant has a right to adduce upon those points which a plaintiff is bound to establish, we shall proceed to notice the several matters forming a defence to this action, the existence of which the plaintiff is not obliged to negative, but that lie upon the defendant to establish; and this of course he is at liberty to do either by the cross-examination of the plaintiff's witnesses, or by the evidence of himself and his own witnesses.

The various matters constituting a legal defence to an action for goods sold and delivered, as well as to other ordinary actions in the County Court, may be classified thus:

1. Defence, that there never was any valid contract between the parties, enabling them to sue or to be sued.
2. Defence, admitting that the plaintiff has a claim, but asserting that the action is commenced prematurely, or is otherwise wrong as to the parties or the Court in which it is brought.
3. Defence, admitting the existence of a claim originally, but asserting that it has been satisfied or discharged by the act of the parties or by operation of law.
4. Defence, admitting a part of the claim and paying money into Court to that amount.

First, of the defences, that there never was any valid contract between the parties enabling them to sue or be sued.

INFANCY.

Infancy.—That the defendant was an infant, or in other words, was under the age of 21 years, at the time of the contract made, is a good defence, unless the action be for *necessaries*. *Roscoe*, 6th edit., p. 311.

That the *plaintiff* is an infant and should have sued in the name of his next friend is an objection rather to the

form of the summons than to the action, but may be taken. The Act 9 & 10 Vict., c. 95, sec. 64, only empowers infants to sue as if of full age, for wages or piece-work, or for work as a servant.

When a defendant intends to rely on his infancy, he must give notice in writing to the Clerk of the Court five clear days before the day on which the summons is returnable. When, however, such notice shall not have been given, the Judge, in his discretion, and on such terms as he shall think fit, may adjourn the hearing of the cause, to enable the defendant to give such notice such number of days before the day to which the hearing may be adjourned, as the Judge may think proper. *See Judges' Rules of Practice for the New County Courts, Rule 19.* Unless the plaintiff admits the fact, the defendant must prove that he has given due notice of this defence to the Clerk of the Court, whose duty it is to forward it to the plaintiff; but it is not necessary for the defendant to prove that such notice was communicated to the plaintiff by the Clerk. 9 & 10 Vict., c. 95, s. 76.

It lies upon the defendant to prove his infancy, as it is a fact peculiarly within his own knowledge. *Borthwick v. Carruthers*, 1 T. R., 648. As infancy is no defence where the action is for necessities, it is of importance to consider what are and what are not necessities.

What are or are not necessities as regards goods, &c.—An infant may bind himself for necessities, that is, for meat, drink, apparel, medicines, and similar necessities. *Roscoe*, 6th edit., p. 311. The question of necessities is a relative fact to be governed by the fortune and circumstances of the infant, and the proof of those circumstances lies on the plaintiff. *Per Lord Kenyon, C. J. Ford v. Pothergill*, 1 Esp., 211. The word necessities is not confined in its strict sense to such articles as are necessary for the support of life, but extend to articles fit to maintain the particular person, in the state, station, and degree of life in which he is. *Peters v. Fleming*, 6 M. & W., 42; 9 L. J. Exch., 81. A watch and some other things of a like kind may not be unnecessary for a young gentleman who goes into society where such things are worn; but a diamond ring, or pictures, or race-horses, cannot be necessities. And suppers, ices, fruits, and confectionary are not *prima facie* necessities for an undergraduate of one of the universities; and the Judge should so direct a jury, if no explanation shewing their necessity be given. If any special circumstances be shewn, such as the order of fruit, ices, &c.,

by a medical attendant in the case of the defendant's illness, then the jury must decide whether the articles were necessities or not. *Wharton v. Mackenzie*, 13 L. J., Q. B., 130; *Cripps v. Hills*, *Ibid*.

An infant, a captain in the army, has been held liable for a livery ordered by him for his servant, but not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 T. R., 578; and see *Coates v. Wilson*, 5 Esp., 152. So an infant, a lieutenant in the navy, is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, Holt, N. P. C., 77.

Goods may be necessities in point of quality but not in point of quantity. Therefore, when an infant is already provided with sufficient necessities by his father, or has been supplied by other tradesmen than the plaintiff, and consequently was under no necessity to purchase that for which he is sued, he is not liable, although the plaintiff was not at the time aware of the fact; and it is not material that the infant has not paid for those necessities with which he was already supplied, or even that he has successfully defended actions brought against him for the price of them. *Vide Chitty on Contracts*, 3rd edit., p. 145, and cases there cited. Thus, if a minor has been supplied with ten coats by one tradesman, and immediately after that the plaintiff supply him with another, the plaintiff is not entitled to be paid for such other coat, as it was not necessary. *Burghart v. Angerstein*, 6 C. & P., 690. It is the moral though not the legal duty of a tradesman, by inquiry, to ascertain the real occasion which the infant has for the goods he is about to purchase, although they are goods, which, generally speaking, fall within the description of necessities. *Chitty on Contracts*, *supra*. It is not material, however, to inquire whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessities with ready money. *Burghart v. Hall*, 4 M. & W., 727.

Whether goods, &c., are necessities or not is a mixed question of law and fact. *Maddox v. Miller*, 1 M. & Sel., 738. It is usually left to the jury, subject to the control of the Court as to the manner in which the jury have exercised their discretion. *Harrison v. Fane*, 1 M. & G., 550, 553.

Where the action though in form *on contract*, is in fact founded upon the *tort* of the defendant, his infancy will be no defence. *Bristow v. Eastman*, 1 Esp., 172. *Vide post*, "money had and received."

Proof of infancy.—Infancy may be proved by calling

any person who can speak as to the time of the defendant's birth; or by declarations of deceased members of his family, mentioning the time of his birth, with proof of identity. *Roscoe*, 6th edit., p. 313.

Although parish registers are not evidence of the time or place of birth, the evidence of baptism connected with other evidence, may raise a presumption as to the time. *Phillips*, *Evid.*, 9th edit., p. 233.

Evidence for the plaintiff in reply.—As the defendant has the power of contradicting the testimony of the plaintiff's witnesses, so the plaintiff is of course at liberty to call evidence to rebut the testimony of the defendant's witnesses, and also in answer to the defence of "infancy," he may shew that the defendant ratified and confirmed the contract after he attained the age of twenty-one, and before action brought. *Thornton v. Illingworth*, 2 B. & C., 824. Or that he promised, &c., after full age. *Cohen v. Armstrong*, 1 M. & S., 724.

A contract made by an infant for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against policy, that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a consideration existing before, it does not make it a legal debt from the time of making the bargain. *Thornton v. Illingworth*, 2 B. & C., 826. The defendant therefore will not be bound beyond the extent of his new promise, as when he promises to pay half-a-crown in the pound on the whole debt, he is not liable beyond that sum. *Green v. Parker*, 1 Esp. Dig., N. P. 198. *S. C. Peake*, *Ev.*, 297.

The 9 Geo. IV., c. 14, s. 5, enacts that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. The acknowledgment must therefore be in writing and signed by the party.

A bare acknowledgment, or part payment after age, will not be sufficient, there must be an express promise, *Thrupp v. Fielder*, 2 Esp., 628, and such promise must be voluntary. *Harmer v. Killing*, 5 Esp., 102. But no particular form is necessary, the paper need have neither date nor address, nor need the amount be stated. *Hartley v. Wharton*, 11 A. & E., 934; *Roscoe*, *Ev.*, 6th edit., p. 312. The following paper was signed by the defendant. "I am sorry to give you so

much trouble in calling, but I am not prepared for you, but will, without neglect, remit you in a short time." The paper had no address or date, and specified no sum; but it was proved orally that the defendant delivered it to the plaintiff's agent on being pressed for the debt, the amount of which was also proved by oral evidence. This was held sufficient to satisfy the Statute. *Hartley v. Wharton, supra.*

COVERTURE.

The coverture of the plaintiff or defendant, that is to say, that the plaintiff or defendant is a married woman, and that consequently the husband ought to sue or be sued is a good defence.

Notice of this defence must be given to the Clerk of the Court five clear days before the day on which the summons is returnable. Rule 19.

If a married woman during her coverture sell goods, the right to recover the value of the property thus parted with, vests in the husband, and the action must be brought in his name. If the wife brings it in her name the defendant may set up the plaintiff's coverture as a defence, shewing that the defendant is liable to her husband, and therefore cannot be called on to pay her, although he was not aware at the time he bought the goods of the plaintiff's marriage.

If the plaintiff has married since the goods were supplied by her, her husband must join with her in the action, and if she sues alone the defendant may prove the fact of her subsequent marriage.

The defence of coverture, however, generally arises where goods have been supplied to a married woman living apart from her husband, or she has married subsequently to the delivery of the goods. The liability of a husband for goods supplied to his wife, either before or after marriage, will be considered under the evidence in actions for goods supplied to third parties. We are now considering the defences to actions for goods actually sold and delivered by the party suing to the party sued.

A married woman living apart from her husband, and having a separate and sufficient maintenance, cannot be sued as a single woman. *Marshall v. Rutton*, 8 T. R., 545. Even a divorce *à mensa et thoro*, for adultery, does not so far destroy the relation of husband and wife as to render the latter liable as a *femme sole*, although she assumes that character. *Lewis v. Lee*, 3 B. & C., 291. But after a divorce *ab initio*, the wife becomes a single woman by operation of

law, and it is the same as if she had always remained single. *Austey v. Manners, Gow.*, 10; *Roscoe*, 8th edit., p. 305.

When the legal existence of the husband may be considered as extinguished or suspended; when he is dead in law, as in the case of transportation for life, or a limited term under a legal judicial sentence, his wife may contract so as to render herself personally responsible, and may sue and be sued upon her agreements. And although a convict sentenced to transportation remain in this country (at the hulks) the wife may be considered as a *femme sole* whilst the sentence is in force. *Ex parte, Franks*, 7 Bing., 762; 1 *Id.* & *Scott*, 1. It has been decided at Nisi Prius, that a married woman, whose husband has been transported for seven years, may even after the expiration of that time maintain an action as a *femme sole*, if her husband remain abroad, on the ground that her husband by so doing abjured the realm. *Carrol v. Blencow*, 4 Esp., 27. But the right to return after the period prescribed being undoubted, and the infliction of the punishment having rendered the husband (at all events if he returned) *liber et legalis homo*, and competent to sue, much difficulty appears to exist in considering the mere *non-return* as an abjuring of the realm; although it might be so if the husband clearly had no intention to return home, and voluntarily remained abroad. *Chitty on Contracts*, 3rd edit., p. 179, and see cases cited there. But the wife of an Englishman who is merely resident abroad cannot be sued on her contract, *Marsh v. Hutchinson*, 2 B. & P. 226; *Stretton v. Busnach*, 1 Bing. N.C., 139, although it was made before her husband became bankrupt, and absconded without appearing to his commission, and continues to reside abroad. *Williamson v. Dawes*, 9 Bing., 292.

In some other cases a married woman has been allowed to be sued as a single woman. If the wife of a foreigner, who is himself resident abroad and never has been in this country, live and trade here as a single woman, she may be sued as such. *De Gaillon v. L'Aigle*, 1 B. & P., 357. And where a French emigrant left his wife in this country and resided himself abroad, Lord Kenyon held that this was tantamount to an abjuration of the realm in a native, and that the wife might be sued as a single woman. *Walford v. Duchess de Pienne*, 2 Esp., 554; *Franks v. Same*, *Id.*, 587; *Bardon v. Keverberg*, 2 M. & W., 64. But in a similar case Lord Ellenborough held that the wife was not so liable, and the Court of King's Bench concurred in that opinion. *Kay v. Duchess de Pienne*, 3 Camp., 123. Where the husband has abjured the realm, *Lean v. Schutz*, 2 W. Bl., 1196;

Lewis v. Lee, 3 B. & C., 297; the wife is to be considered as a *femme sole*. *Roscoe*, 6th edit., p. 305. The defendant is not prevented by her previous admissions and acts as a single woman from shewing her coverture. *Davenport v. Nelson*, 4 Camp., 36.

Although in the superior Courts the marriage of the defendant between the period of the delivery of the goods and the commencement of the action is only ground of a plea in abatement, it appears clear that in the County Courts this fact is equally a good defence on the trial of an action brought against the wife alone, for the summons has not been issued against or served upon the proper parties—objections fatal to the plaintiff's right to recover.

When the action is for goods supplied to the wife *after* marriage, the summons should be against the husband alone, provided he is liable at all; and if for goods supplied to a wife *before* marriage, then the summons should be against the *husband and wife*. See *post*, *Action for goods sold to third parties*.

Proof of coverture.]—When coverture is the defence, the defendant may prove her marriage in three different ways:

1. By a person who was present, *or*
2. By the register, coupled with proof of identity, *or*
3. By the usual presumptive evidence of marriage, viz., reputation and cohabitation.

1. *By a person who was present*.]—If a marriage is proved by a person who was present it is not necessary to prove the registration, or licence, or banns. *Allison's Case*, R. & R., C. C. R., 109.

The defendant is a competent witness, and so is her husband; and as the latter would be giving evidence against his own interest, it is clear that his statement would be at least sufficient *prima facie* evidence of the marriage. If he is not a witness the defendant should be prepared with some confirmatory evidence of this or either of the following descriptions.

2. *By the register, coupled with proof of identity*.]—Registers of baptisms, marriages, and deaths, may be proved by examined copies, or by production of the register itself. *B. N. P.*, 247. In order to prove the register of a marriage it is not necessary to call the attesting witnesses. *Birt v. Barlow*, 1 Doug., 172.

By 3 & 4 Vict., c. 92, certain non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the registrar-general are made admissible in evidence, either by producing them or certified extracts

from them, after previous notice to the opposite party of the intention to use them.

The registration of marriage is now regulated by 6 & 7 Will. IV., c. 86, (passed 17th August, 1836) which provides that certified copies of entries, purporting to be sealed with the seal of the registrar-general's office, shall be evidence of the birth, death, or marriage, to which it relates without other proof of such entry. Sect. 38. It should seem that under the same Act, the entries of other registrars besides the registrar-general may be evidence under certain limitations. Sects. 22, 23, 28; and as well they, as all rectors, curates, &c., are bound to give certified copies. Sect. 35. But it is not expressly provided that these latter certificates shall be evidence without further verification. *Roscoe*, 6th edit., p. 84.

The Act 6 & 7 Will. IV., c. 85, for amending the law of marriage, provides for the registration of marriages *solemnized under that Act*, and is also incorporated with the above Act, c. 86; and it enacts that the provisions of the Act, c. 86, relating to the register of marriages, or certified copies thereof, shall extend to marriages under the Act, c. 85.

As the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers, to prove they rang the bells and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding-dinner, &c. *Birt v. Barlow*, 1 Doug., 172. To prove the handwriting of the parties in the register, it is not necessary to call the subscribing witness. *Per Lord Mansfield, S. C. ib.*; *Roscoe*, 6th edit., p. 84.

An entry of a marriage in a day-book is not admissible in evidence, if the entry has been afterwards made in the register. *May v. May, Str.*, 1073; and see *Doe d. Warren v. Bray*, 8 B. & C., 813.

3. *By presumptive evidence of marriage, reputation, and cohabitation.*—Where the defendant set up the coverture of the plaintiff, Lord Ellenborough held that a mere acknowledgment by the plaintiff and the person alleged to be the husband, of their marriage, without actual proof of the marriage or cohabitation, were insufficient to prove the coverture. *Wilson v. Mitchell*, 3 Camp., 349.

The defendant having proved her marriage by either of the preceding modes, must, if the marriage was before the delivery of the goods, shew that her husband was living at the time of the debt contracted. If she shews him to have been alive

within seven years of the commencement of the action it will be sufficient *prima facie* evidence. *Hopewell v. De Pinna*, 2 Camp., 113. When a party has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the time of his death. *Nepean v. Doe d. Knight*, 2 M. & W., p. 894.

In answer to the defendant's proof of coverture, the plaintiff may prove that the supposed husband had a former wife living, which would of course shew the subsequent marriage to be illegal. *Ganer v. Lanesborough, Peake*, 17.

PARTNERSHIP BETWEEN THE PLAINTIFF AND DEFENDANT.

It is a clear general rule that one partner cannot sue his co-partner at law in respect of the partnership accounts, or in any other matter connected with the partnership transactions, which would involve the consideration of such accounts; whether the firm exist for general purposes or have reference only to a particular trade or branch thereof, or, it seems, only a specific adventure or speculation. *Chitty on Contracts*, 3rd edit., (p. 236. Therefore one partner cannot sue his co-partner for goods sold to the firm. *Harvey v. Kay*, 9 B. & C., 356. And consequently it is a good defence if the defendant can shew a partnership in the transaction between himself and the plaintiff. A transaction between partners may, however, by agreement, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another; and the jurisdiction of the County Court is expressly extended to the recovery of the whole or part of the unliquidated balance of a partnership account, not exceeding 20*l.* 9 & 10 Vict. c. 95, s. 65. This defence of a partnership between the plaintiff and defendant can but rarely arise in an action for goods sold. See *post*, actions relating to money.

Proof of partnership.—If there is a deed of partnership between the plaintiff and defendant the production and proof of it will be the best evidence; but although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stark., 405. See *post*, proof of partnership where goods are supplied to partner.

FRAUD.

The proof of fraud in the party seeking to enforce a contract is a good defence.

Fraud is of various kinds; but it generally consists either

in the *misrepresentation*, or the *concealment*, of a material fact. It is difficult to imagine that a general misrepresentation as to value, &c., the truth of which a party has an opportunity of ascertaining; or the concealment of a matter which an individual possessed of ordinary sense, vigilance, or skill, might discover; can in law constitute fraud. There can be no fraud if the bargain be merely a fair contest, or trial of judgment. In all contracts, each party naturally and fairly attempts to obtain advantage. As in a contract of sale, the vendor endeavours to extol the article, the vendee to depreciate; each exercises his own judgment, and neither party can be said to be guilty of a *fraud* in making bare assertions, upon which the other party probably places no reliance, and which he does not embody in his contract. *Chitty on Contracts*, 3rd edit., p. 682.

The fraud may be passive, as by permitting a party to labour under error. Thus where the defendant erroneously supposed that a picture had been in the possession of Sir F. Agar, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, Lord Ellenborough held that the plaintiff could not recover the sum for which the picture was sold, the price being probably enhanced by the error. *Hill v. Gray*, 1 Stark, 434. So where a vendor permits the vendee to buy under a false representation by a stranger. *Pilmore v. Hood*, 5 Bing. N. C., 97. So where goods are falsely described as "the property of a gentleman deceased" or "to be sold by executors;" for such property is likely to be sold without reserve. *Per Lord Mansfield, Beawell v. Christie, Coup.*, 395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such appointment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 Bing., 368; *Wheeler v. Collier*, M. & M., 128, *Roscoe*, 6th edit., p. 306. The election on the part of the defrauded party to rescind the contract, must be exercised as soon as the fraud is discovered; and if after the fraud practised on him has come to his knowledge, he deals with the goods, he cannot repudiate the contract, although he subsequently discovers further circumstances connected with the same fraud. *Chitty on Contracts*, 3rd edit., p. 681.

ILLEGALITY.

Where a contract is illegal it cannot be enforced, and proof of its illegal nature will be a good defence to the action. It is however for the party who takes the objection to prove it clearly.

The cases in which contracts for the sale of goods cannot be enforced may be divided into two classes: 1. Contracts void at common law; 2. Contracts void by statute.

1. *Contracts void at common law.*—Contracts of sale having an immoral object in view, are void in law. Thus a print-seller cannot recover the price of caricatures of an immoral, obscene, or libellous tendency, which he sent to a customer who had given a general order for all the caricature prints that had ever been published, *Fores v. Johnes*, 4 *Esp.*, 97; and if a tradesman sell clothes to a prostitute, for the purpose of enabling her to carry on her prostitution, and expect to be paid from the profits of it, such a contract is illegal, and cannot be enforced in a court of justice; but a mere knowledge of her way of life will not prevent the tradesman from recovering. *Bowry v. Bennet*, 1 *Camp.*, 348. *Chitty on Contracts*, 3rd edit., p. 418, and cases there cited.

Contracts for the sale of goods are illegal, where the goods are bought and sold for the express purpose of being smuggled into this country, and the vendor is either a sharer in the transaction or assisted in the act of smuggling, but a foreigner settling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intended to smuggle them into this country, but took no actual part in the illegal adventure. *Pelecat v. Angell*, 2 *C. M. & R.*, 311; otherwise where the plaintiff not only knew the goods were to be smuggled into England, but packed them in a particular manner by the defendant's desire, for the purpose of evading detection. *Wagnell v. Reed*, 5 *T. R.*, 599.

A contract made by an innkeeper to supply voters at an election with meat, drink, and refreshments, would be illegal if the object were to induce the voters to vote for a particular candidate. *Thomas v. Edwards*, 2 *M. & W.*, 215.

The price of beer furnished by the plaintiff, a publican, to the defendant who is at the time drunk produced by drinking in the plaintiff's house, cannot be recovered. *Brandon v. Old*, 3 *C. & P.*, 440.

2. *Contracts void by statute.*—No action lies for the value of goods knowingly sold for purposes rendered illegal by statute, as brewer's drugs, *Langton v. Hughes*, 1 *M. & Sel.*, 593; or bricks delivered under statutable size unknown to the buyer. *Law v. Hodson*, 11 *East*, 300. See *Gas Light Company v. Turner*, 5 *Bing. N. C.*, 666; & *S. C.*, *Id.*, 324; or certain articles without a permit, 2 *W. IV.*, c. 16, s. 12; or the sale of the goods was an illegal one of fireworks, contrary to 9 and 10 *W. III.*, c. 7. See *Fenwick v. Laycock*,

1 Q. B., 414; or coals delivered without a vendor's ticket, *Little v. Poole*, 9 B. & C., 192.

But in the case of statutes rendering it necessary for persons dealing in specified goods to take out licences for that purpose, there is no intention to prohibit a contract for the sale of such goods, but merely by inflicting a penalty personally on the seller, to secure the receipt of the revenue, and the price of goods sold even by an unlicensed vendor might therefore be recovered, *Chitty on Contracts*, p. 420; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the licence to carry on the business of distillers was no answer. *Brown v. Duncan*, 10 B. & C., 93; and see *Johnson v. Hudson*, 11 East, 180; *Smith, v. Mawhood*, 15 L. J. Ex. 149. *Roscoe*, 6th edit., p. 308. A brewer delivering beer to a person not the licensed keeper of the public house where it is delivered, may maintain an action against him for the price. *Brookes v. Wood*, 5 B. & Ad., 1052; and see *Hodgson v. Temple*, 5 Taunt., 181.

Sale of spirituous liquors.—By statute 24 Geo. II., c. 40, s. 12, no person whatsoever shall be entitled unto or maintain an action, cause, or suit for, or recover, either in law or in equity, any sum or sums of money, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time to the amount of twenty shillings or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at the least, and that without fraud or covin, and where no part of the liquors so sold or delivered shall have been returned, or agreed to be returned, directly or indirectly. The statute was once held not to extend to the case of a person who purchases liquors in small quantities to retail them again; as the keeper of an eating-house; *Jackson v. Attrill, Peaks*, 180; but this case has been overruled by *Hughes v. Dona*, 1 Q. B., 294. It applies to the case of a tavern-keeper's bill which the defendant has contracted, and in which there are items for spirits supplied to the defendant's guests, *Burnyeat v. Hutchinson*, 5 B. & A., 241; and it relates to spirits mixed with water, *Scott v. Gillmore*, 3 Taunt., 226. But it has been considered that the statute does not avoid the sale of liquors under twenty shillings supplied by a publican to an officer in the army to be used out of the plaintiff's house by recruits and others under the command of the defendant,

Spencer v. Smith, 3 Camp., 9. Nor does it extend to spirits supplied by an innkeeper to his resident guests. *Proctor v. Nicholson*, 7 C. & P., 67; and see *Roscoe*, 6th edit., p. 309. *Chitty on Contracts*, 3d edit., p. 425.

Sale on a Sunday.]—By 29 Car. II., c. 7, s. 1. no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord's-day, or any part thereof, works of necessity and charity alone excepted.

The statute does not make *every* work or business done on the Lord's-day illegal, but only carrying on trade and ordinary callings on that day, and therefore a sale on a Sunday which is not made in the exercise of the trade or ordinary calling of the vendor, or his agent, is not void at common law, or by the above statute.

Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennell v. Riddler*, 5 B. & C., 408. But where A, not knowing that B was a horse-dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, and the price, which was above £10, was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that (under the Statute of Frauds, *vide ante*, p. 5,) there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Bloxsome v. Williams*, 3 B. & C., 332. Though the contract was made by an agent and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow*, 4 Bing., 84. But where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover their value. *Williams v. Paul*, 6 Bing., 653. *Roscoe*, 6th edit., p. 309. But it may be doubtful whether any contract can arise from a detainer of goods even with an express promise to pay. Where the express contract made is an illegal one, at all events no promise would be *implied* from the detainer, though the property in the goods would pass to the vendee. *Chitty on Contracts*, 3rd edit., p. 424.

There are various other statutes rendering the sale of articles illegal except under certain conditions, such as the 1 & 2 Will. IV., c. 37, prohibiting the sale of game except by licensed persons, the 31 Geo. II., c. 40, forbidding the purchase of cattle, &c., by salesmen, &c., in London.

Where the defendant relies on a public Act of Parliament such as those referred to, the Judge will take notice of the Act. There is no proof of the existence of the Statute required to be produced by the defendant, who will merely have to shew that the transaction in question falls within the provisions of the Act or the decisions of the Court rendering it illegal. As in other defences, he may establish it by the cross-examination of the plaintiff and his witnesses, or by his own evidence and that of his witnesses.

Defences admitting that the plaintiff has a claim against the defendant, but asserting that the action is commenced prematurely, or is otherwise wrong as to the parties, or the Court in which it is brought.

ACTION BROUGHT BEFORE CREDIT EXPIRED.

When goods have been purchased and the seller agrees to give a certain time for payment, he cannot sue for the price until the expiration of that time, and therefore it is a good defence to shew that the action has been brought before the time for credit expired.

Even where goods are fraudulently bought on credit the seller cannot sue for goods sold and delivered before the credit has expired, though he may, it appears, maintain an action to recover back the goods themselves. *Ferguson v. Carrington*, 9 B. & C., 59; *Strutt v. Smith*, 1 C. M. & R., 312. See post, *Actions for Torts—Injuries to property*.

In calculating the time of the credit, the day of the sale must be excluded, and therefore, where goods were sold on the 5th of October, to be paid in two months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature. *Webb v. Fairman*, 3 M. & W., 473.

A person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give: an action for goods sold was held not to lie till the expiration of five months, *Mussen v. Price*, 4 East, 147; *Lee v. Risdon*, 2 Marsh, 495; for if by a contract it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and although no bill should be given the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. *Mussen v. Price*, supra. So when goods are sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option; this is in effect a nine months' credit. *Helps v. Winterbottom*,

. 2 *B. & Ad.*, 431; *Price v. Nixon*, 5 *Taunt.*, 338. And where goods were sold and work done, the price of which amounted to £244, upon an agreement that £30 should be paid in ready money, and the residue by bills of £30 each, payable in succession every three months, it was held that until the expiration of the period at which the last bill would become due, the vendor could not recover in an action for goods sold and delivered, and work done, any part of his claim, although the defendant had omitted to pay the £30, or to give the bills, *Paul v. Dod*, 15 *L. J.*, *C. P.*, 169; but the plaintiff might have framed his plaint for breach of the contract, and recovered damages in that way. But when goods were sold at three months credit, the vendor agreeing to take the vendee's bill at three months' date, at the end of the first three months if he wished for further time; and the vendee at the end of three months did not give such bill. Lord Ellenborough held that the vendor might bring an action for goods sold and delivered immediately, *Nickson v. Jepson*, 2 *Stark.*, 227; and where bills given for goods are dishonoured the vendor may sue for the price immediately, *Hickling v. Hardey*, 7 *Taunt.*, 312, provided the bills are in the hands of the seller, for if they are in the hands of third persons, that is a defence to the action, for the defendant may be called upon by those persons to pay the bills. *Kearslake v. Morgan*, 5 *T. R.*, 513; *Burden v. Halton*, 4 *Bing.*, 455. See *post*, *Defence*, *Payment*.

THAT THE PLAINTIFF HAS PARTNERS WHO OUGHT TO HAVE JOINED.

If the plaintiff has one or more partners who had an interest in the goods sold and in the value or price sought to be recovered, the partners should be joined, although the contract in point of fact was only made with one; so that if any such partner exists who is not joined in the action, the plaintiff cannot recover.

For the evidence which a defendant may give to prove the existence of such partnership, see *post*, *Proof of partnership where goods supplied to partner*.

When, in order to prove a partnership between *Didot* and *Foudrinier*, whose assignees were plaintiffs in the suit, a witness was asked by the defendant whether he had not heard *Foudrinier* say, that by a deed between him and *Didot*, an interest belonged to *Didot*, *Abbott, C. J.*, was of opinion that no such question could be asked without the production of the instrument, or accounting for the non-production. *Bloxam v. Elsie, R. & M.*, 187. But this case appears to be

overruled by *Slatterie v. Pooley*, 6 *M. & W.*, 664, where it was decided that parol admissions are evidence against the party making them, although they may relate to the contents of a written instrument. See also *Newhall v. Holt*, 6 *M. & W.*, 662, *S. P. Roscoe*, 6th edit., p. 2.

It is to be observed, that it is no defence to an action in the County Court to say that a defendant has a partner who is not joined in the action. Section 68 of the Statute 9 & 10 Vict., c. 95, enacts that "where any plaintiff shall have any demand recoverable under this Act against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process and judgment, may be obtained and execution issued against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued, or may not be within the jurisdiction of the Court; and every such person against whom judgment shall have been obtained under this Act, and who shall have satisfied such judgment, shall be entitled to demand and recover in the County Court, under this Act, contribution from any other person jointly liable with him."

WANT OF JURISDICTION.

That the cause of action has been divided for the purpose of bringing two or more suits.—Section 58 of the 9 & 10 Vict. c. 95, enacts that all pleas of personal actions, where the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise, may be holden in the County Court; but Section 63 provides that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts, but any plaintiff having cause of action for more than twenty pounds, for which a plaint might be entered under that Act if not more than twenty pounds, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding twenty pounds; and the judgment of that Court shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly.

What amounts to dividing a cause of action within the meaning of the Act is a question of great difficulty, and one not yet settled. Where the plaintiff sued the defendants who were railway contractors for articles supplied to workmen engaged on the line, and having recovered the sum of 11*l.* 5*s.*, proceeded to bring other actions for similar articles supplied to other workmen, but under the same identical order of the defendants as in the first action, the Court of Exchequer granted a rule to shew cause why a writ of pro-

hibition should not issue to the Judge of the County Court to stay all further proceedings, and to return into that Court the plaint which had been heard, upon the ground that the subject-matter of the action was beyond the amount in reference to which the County Court had jurisdiction. *Grimley v. Acroyd, and another, Court of Exchequer, Michaelmas Term, 1847.* The rule has not yet been argued.

Independently of the above clause, it is a rule of law that a cause of action cannot be split into several portions, for the purpose of commencing suits for each in an inferior Court, but to come within that rule the cause of action must be one and entire. *The King v. the Sheriff of Herefordshire, 1 B. & Adol., 672.*

There is no doubt, as well under the 63rd Section as under the above rule of law, that different contracts, such as bills of exchange, or goods supplied under separate and independent contracts give the right to maintain a separate action on each, but a difficulty arises in applying the language of the 63rd Section to cases of a running account, such as the ordinary supply of goods of the same or different nature by a tradesman to a customer. The question arises whether a separate action can be maintained for each article supplied on a verbal order, or whether in the usual case of sending in a bill at the end of the year the whole year's account is to be considered as one cause of action, depriving the tradesman of the right to proceed in the County Court for the recovery of it, where it exceeds 20*l.*, unless he abandons the excess. It seems under the old rule of law that the plaintiff might bring an action in the County Court for goods supplied during any part of the year or on any particular day, without being deprived of the right to bring one or more other actions for goods subsequently delivered, although the right to sue for such subsequent goods had accrued at the time of the commencement of the first action. A carrier had conveyed goods for the defendant, and the carriage amounted to 1*l.* 4*s.*, and in about a month afterwards he carried more goods for the defendant, and the carriage upon that occasion also amounted to 1*l.* 4*s.*, and for these sums respectively he commenced two suits in the County Court. It was held that the plaintiff was at liberty to bring the two actions. Lord Tenterden, C. J., said, "I am of opinion that this case does not come within the rule of law, which prohibits the splitting of a course of action into several portions for the purpose of commencing suits for each in an inferior Court: to be so, the cause of action must be one and entire. But, in this case, the two items of 1*l.* 4*s.* each are perfectly distinct debts, the one having no connexion with the other. When

the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the County Court, and his having incurred another and distinct debt with the plaintiff afterwards should not, I think, have the effect of depriving the plaintiff of his remedy in the County Court for the first debt; and if he may still have that remedy for the first debt he has it, of course for the second also." *The King v. the Sheriff of Herefordshire*, 1 B. & Adol., 672. By analogy it would appear from this case that a tradesman, a tailor, for instance, making and delivering goods at intervals in the course of the year, would have been at liberty at common law to bring separate actions in the old County Court for each article so supplied, the whole year's delivery not being merely *one entire contract* but several.

The 63rd section of the 9 and 10 Vict., c. 95, however, does not speak of an *entire contract*, but of a *cause of action*. It seems a fair construction of the clause to hold that although the contract may be entire yet if it appears to the court that part of a demand which but for the account might have been included in the one action in the County Court is omitted for the purpose of bringing another action; the court has no jurisdiction unless the party suing abandons the excess. Thus, if a tradesman sues for part only of a past year's account amounting to something within 20*l.*, in the absence of any explanation when the rest of the account is omitted, presumption would be strong that his object was to bring a subsequent action for the remainder, and therefore he ought to abandon the excess or be nonsuited. On the other hand, where a tradesman has sent in his bill at the end of a year, and the amount still remains due at the expiration of the second year, it appears hard to prevent his recovering by action the amount of the first year's account which is so much over-due without being compelled to include the second year's account which has just been delivered, and for which he may be willing to give time for payment. The mere fact that he has in the bill for the last year included as is the usual custom the amount for the year before, ought not to make any difference in his right to recover for the former year alone*.

* Conflicting decisions have been pronounced by the Judges of the County Courts on the 63rd section. Mr. Palmer held, at Bristol, that a shoemaker was entitled to sue for 17*l.* 8*s.*, part of his amount, the defendant being indebted to him in upwards of 60*l.*; for that as every order for and delivery of goods formed a separate cause of action, a trader might divide his demand into as many parts as there were causes of action. Mr. Moylan, at Westminster, says, "In the case of a shoemaker or tailor, where no stipulation is made as to cash payments, an implied understanding, founded on the general custom in Westminster, would be

The purpose of the plaintiff is to be gathered from the particular circumstances of each case.

The defendant may prove the fact that the plaintiff has divided his cause of action for the purpose of bringing it within the jurisdiction of the court, in the same way he can prove any other ground of defence, by the admission and cross-examination of the plaintiff and his witnesses, or by adducing evidence himself. If the Judge holds (and it is a point peculiarly for the Judge and not a jury to decide) that the plaintiff has divided his cause of action within the meaning of the 63rd section, the plaintiff must elect either to be nonsuited or to abandon the remainder of his cause of action exceeding 20*l*. It seems to be sufficient if the plaintiff *at the trial* abandons the excess, and it is not necessary that notice should be given in the summons or otherwise of his intention.

As section 58 gives the court jurisdiction in actions to recover sums not exceeding 20*l*., whether on balance of account or otherwise, it is immaterial that the amount originally due exceeded 20*l*., if by credit given for payments on account or for a cross-demand of the defendant, it is reduced to 20*l*.

That the defendant was not resident, and that the cause of action did not arise within the district.—The 9 and 10 Vict., c. 95, s. 60, enacts that the summons “may issue in any district in which the defendant, or one of the defendants, shall dwell or carry on his business at the time of the action brought; or by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six

that the tradesman's bill was payable at Christmas. The bill was sent in at Christmas, and although it may contain twenty different items of the value of 5*l*. each (each item having been delivered separately in the course of the year), I never could consider such a bill as fairly divisible into five, any more than into twenty separate causes of action; and I should certainly hold it to be beyond the jurisdiction of this Court.”—*The County Courts Chronicle*, p. 37; *Law Times*, vol. 8. pp. 206, 233. Mr. Gale, at Southampton, subsequently, says, “In the ordinary case of the delivery of goods by a tradesman to his customer, each order and delivery would create a separate cause of action. There might, however, be circumstances which would prevent the several deliveries giving birth to more than one cause of action, if it were expressly agreed, or an agreement could be implied from circumstances, that these were all to be paid for together at some fixed period. In such a case, the tradesman could not sue for the price of any portion of the goods until that period was passed. The mere fact of including the items of the several deliveries in one bill would not have the effect of merging several causes into one, if there was no precedent agreement on the subject.”—*County Courts Chronicle*, p. 66.

calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts."

To deprive the Court of jurisdiction, under this section, the defendant must neither have dwelt or carried on his business in the district, at the time, or within six months, of the commencement of the action; and the cause of action must have arisen out of the district.

As to what is dwelling, or carrying on business, see *Moseley's Treatise on the County Courts*, pp. 149, 159; and as to when a cause of action shall be said to arise within a given district, and also as to the definition of district, *vide ibid.*, pp. 184, 175.

It may be observed that the defendant would not in general be bound to prove the *boundaries of the district*. If the name and parish of the places in question appear, the Court will take notice, or inquire whether they are within the district.

Privilege.—"No privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this Act," 9 & 10 Vict., c. 95, sec. 67.

"Provided always, and be it enacted, that nothing in this Act contained shall be construed to alter or affect the rights or privileges of the chancellor, masters, and scholars of the universities of *Oxford* or *Cambridge* respectively, as by law proposed, or the jurisdiction of the courts of the chancellors or vice chancellors of the said universities, as holden under the respective charters of the said universities, or otherwise." *Ibid.*, sec. 140.

Under this last section, a defendant may prove that he is a member of either of the above universities, in residence, which entitles him to the privilege of being sued in the University Court, wheresoever the cause of action may have arisen. The fact that the *plaintiff* is a member of one of the universities, does not take away the jurisdiction of the County Court, and it seems that unless the defendant (or the authorities of the universities), avails himself of the privilege, the action may be proceeded with in the County Court; see further as to the privileges of the universities, *Moseley's County Courts*, p. 161.

It has been contended that the 67th section of the County Courts' Act, above cited, does not take away the privilege of attorneys to be sued in the superior courts, but there appears to be no substantial reason for so limiting the force of the express language of the section. A rule for a

prohibition, however, on this ground, has been granted by the Court of Queen's Bench.

Title, &c., in dispute.—The defence that the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, is in question, or the validity of any devise, bequest, or limitation, under any will or settlement, may be disputed, can seldom if ever arise in an action for goods sold and delivered, and, therefore, will more properly be considered in another part of the work.

In conclusion, it may be observed that all objections of whatever nature by a defendant to the jurisdiction of the County Court, should be made at the earliest opportunity, and before the defendant discloses any other defence he may have to the action, for the judge of the County Court might possibly, in analogy with the law of the superior courts, hold that any delay, or the setting up any other ground of defence, operates as a waiver of the technical objection of the want of jurisdiction, although it is difficult to see by what means the mere omission or negligence of the defendant can operate to give the Court a jurisdiction which the statute deprives it of.

Defences admitting the existence of a claim originally, but asserting that it has been satisfied or discharged by the act of the parties, or by operation of law.

PAYMENT.

Of those defences which admit that the goods were sold and delivered, as alleged by the plaintiff, but deny his right to maintain an action, the most simple and obvious one is that the defendant has already paid the amount due.

Payment may be inferred from the circumstances of the case, or may be proved by evidence of express payments, receipts, &c.; thus a debt may be presumed to be satisfied from mere lapse of time.

Where the demand was for the proceeds of milk sold daily to customers by the defendant, as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received, without any written voucher passing, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff, *Evans v. Birch*, 3 Camp., 10. So when goods have been consigned to an agent to sell on

commission, it may be presumed, after a reasonable time (e. g. fourteen years) has elapsed, that he has accounted. *Topham v. Braddick*, 1 Taunt., 572.

A payment may be in goods as well as in money, as for instance, if a party delivers goods as for a particular amount, together with a balance in money, then the goods would clearly be delivered as a payment *pro tanto*; whether they were so delivered is a question of fact for the jury.

In actions in the County Court, the question whether goods delivered to the plaintiff by the defendant are to be considered as payment, or only as matter of *set-off*, may be material, inasmuch as in the latter case the defendant to give the facts in evidence, must give notice of the defence of *set-off*, which is unnecessary if the facts constitute *payment*. It is obvious that in general the delivery of goods by the defendant is matter of *set-off*, as constituting a cross demand. *See post, Set-off*.

In law, the actual payment of a smaller sum cannot be deemed satisfaction of a larger demand, although the creditors agree to receive the smaller sum in full discharge of the whole demand, and give a receipt accordingly, *Down v. Hatcher*, 10 A. & E., 121; but a judge of the County Court would probably be justified in considering such a payment and receipt as a settlement of the claim, and adjudicate accordingly. *See post, Composition with Creditors*.

An authority given by the defendant to the plaintiff, to collect and receive debts due to the former, and to pay himself out of the amount, cannot be set up as a payment or satisfaction of the debt, so as to prevent the plaintiff recovering, even although the defendant allege that the plaintiff had the opportunity of receiving a greater sum than was due to him, and that the amount was not received, and was lost by the defendant, owing to the plaintiff's negligence and default. *Gifford v. Whittaker*, 13 L. J., Q. B., 325.

Cheque.—Where the debtor has given the creditor a cheque on his, the debtor's banker, for the amount of the debt, the creditor is to be considered as taking the cheque rather on account of, than in satisfaction of the debt, which he is at liberty to proceed for, as if no cheque was given, in the event of the latter being dishonoured. Unless by an express agreement, a creditor who takes a cheque cannot be said to take it as cash, and to run all risks of its being paid or not. Still, however, the taking a cheque for a debt is a *prima facie* or presumptive discharge, or payment of the demand, *see per Coleridge, J. Gifford v. Whittaker*,

13 *L. J., Q. B.*, p. 326, which presumption lies on the creditor to rebut.

It would be unreasonable to call upon a defendant to prove payment of a cheque he has given to the plaintiff, when that cheque may not have been presented, but may be in the hands of a third party to whom the plaintiff has delivered it, and which when presented the defendant may be called on to meet. See *Pearce v. Davis*, 1 *M. & Rob.*, 365.

If therefore the defendant proves, or the plaintiff admits, the acceptance of the cheque, the latter to entitle himself to sue should show that the cheque was presented and dishonoured.

The defendant must show that the plaintiff received, or agreed to receive, the cheque on account of the debt. If the plaintiff took it from the hands of the defendant, and that transaction is shown to be connected with the debt sued for, the necessary proof is established at once, but where a debtor sends a cheque by letter without any previous arrangement with the creditor, the latter of course is not bound to receive it. If, however, he keeps it without offering to return it, or informing the debtor that he declines taking it, it is to be presumed that he agreed to take it on account of the debt, and he cannot sue for the debt until he has presented the cheque, and it is dishonoured. Where a debtor sent his creditor a cheque, on the 7th of November, the cheque stating that it was *balance account*, and he heard nothing until the 13th, when he received a letter from the creditor's attorney, stating, that as the debtor had not sent the amount, as requested in a letter of the 6th, he had issued a writ, and adding, "the check you sent to Messrs. Hough is ready to be returned;" it was held that this cheque could not be considered as payment, for being conditional the creditor might be prejudiced by using a cheque which stated that it was the balance of account. *Hough v. May*, 4 *A. & E.*, 954.

If the plaintiff shows that the cheque was presented and dishonoured, he is at liberty to bring an action for the original debt, or upon the cheque, *see post*, *Actions on Cheques*, and therefore proof that the cheque was presented and dishonoured, is an answer to the defendant's proof of the delivery of the cheque.

In order to entitle the plaintiff to recover against the drawer of a check, either by an action on the cheque or on the original contract for the goods sold (which latter course we are now supposing him to adopt), he is not obliged to present the check immediately, unless where it is dis-

honoured on account of the insolvency or bankruptcy of the bank upon which it is drawn. Therefore, where a cheque was drawn and delivered on the 13th of June, and was refused payment on the 28th, in consequence of instructions given to the bankers by the maker, it was held that the payer of the cheque was entitled to sue the maker, *Patteson, J.*, remarking that it would be carrying the doctrine of presentment within a reasonable time, very far, if the drawer of a cheque might, by reason of its not being presented within a reasonable time, go to his bankers, and direct them not to pay it; and that as against the drawer himself, there is nothing unreasonable in keeping a cheque for any time short of six years. *Robinson v. Hawksford*, 15 L. J., Q. B., 377, and see *Serle v. Norton*, 2 M. & Rob., 401. If, however, the bankers refuse to pay on the ground of the staleness of the cheque (it being understood as a rule of business with regular bankers not to pay old cheques without inquiry), and the holder were to commence an action against the drawer without giving him an opportunity of authorizing his bankers still to pay the cheque, the plaintiff would probably fail on the averment of due presentment of the cheque, and the non-presentment in a reasonable time might under such circumstances support the defence of payment of the original debt by the cheque. See note (a), 2 M. & Rob., p. 404.

When the cheque has been dishonoured by reason of the insolvency or bankruptcy of the bankers, between the delivery and presentment of the cheque, the plaintiff cannot recover either upon the cheque or upon the original debt, unless the cheque was presented for payment either on the same day or the day after it was received from the drawer. If he retains the cheque for a longer period he is guilty of laches, and it makes no difference whether he has handed the cheque over to a third party, for as against the drawer, it must in the case of the bank's insolvency, be presented by the holder within the above time.

Where the creditor receives from his debtor a cheque drawn by a third party, it must, in order to render the debtor liable in case of non-payment of the cheque, be presented the same or the next day, and notice of the dishonour given to the debtor, to render the latter liable upon the cheque or for the original debt, at least if the cheque were delivered to the creditor on the day of its date. See *Actions on Cheques, post*.

As to the effect of any arrangement between the bankers and the payee, see *post*, *Payment by and to Third Parties*.

Bill of exchange or promissory note.] It is a good defence that the plaintiff has taken on account of the debt, a bill of exchange or promissory note, accepted, made, or indorsed by the debtor for the amount due, payable to the creditor himself, or to a third party. This defence is not founded on the notion that the bill or note operates as an absolute payment or extinguishment of the original debt, or changes its nature; for the right to sue upon the original demand, without resorting to the bill or note, revives on the dishonour of the instrument. *Chitty on Contracts*, 3rd edit., p. 767.

Until the bill or note has been dishonoured, the remedy for the debt is *suspended*, whether the instrument were payable to the creditor only, or be payable to him or order; nor is it material that the creditor has not indorsed it to a third party.

As the taking a bill for a debt is a *prima facie* or *presumptive* discharge or payment of the demand, it lies upon the plaintiff to rebut the inference by proof that the bill or note was not paid or dishonoured. Where, however, the note or bill is that of a third party, it seems the onus of proof that it was paid or was not presented, lies on the defendant. *Robson v. Oliver*, 16 L. J., Q. B., 437.

If the defendant were the acceptor of the bill, or maker of the note, he is not in general entitled to have it presented to him for payment (*see Actions on Bills, &c., post*), yet if it appears that it was given on account of the debt, the plaintiff must produce it to shew that it has not been paid, and is not held by a third person. It is sufficient if the plaintiff has it to produce at the trial, and it is immaterial that at the time of the commencement of the action it was in the hands of a third party, who delivered it to the plaintiff, unless the third party held it for value. *Bardon v. Halton*, 4 Bing., 454.

If the plaintiff has taken the bill or note of a third person, and the defendant was the drawer, payer, or indorser of it, he is entitled to a regular presentment for payment and due notice of dishonour, and if the plaintiff or holder be guilty of *laches* or neglect in regard to such presentment or notice, so that the defendant is exonerated from liability on the instrument; then he becomes equally relieved from responsibility for the original debt; for if a person gives another a promissory note made by another party, either payable on demand or not, it is incumbent on the person who takes the note to be careful and present it in due time to the maker; but when the makers of bank notes were bankrupts at the time the defendant delivered

them to the plaintiff, and they would not have been paid if presented, but the plaintiff was at the time ignorant of the bankruptcy, and within a reasonable time after he learned the fact, he required the defendant to take back the notes and pay the money; these facts were held to be a good answer to the allegation of the delivery of the notes on account and their non-presentation, so as to entitle the plaintiff to sue for the original claim for the goods. *Robson v. Oliver*, 16 L. J., Q. B., 437. But if it had appeared that he had let a long time elapse, he would have made the notes his own by his laches, and his finding out the insolvency afterwards would not have helped him. *By Patterson, J., S. C.*

If a creditor take from his debtor a bill drawn by the latter upon a third person, and after the bill has been accepted, the creditor alter the bill in regard to the time of payment, he makes the bill his own; and it operates as a satisfaction of the original debt, although it be dishonoured. *Alderson v. Langdale*, 3 B. & Ad., 660. But it is otherwise where the debtor is the acceptor of the bill, since he cannot be prejudiced by the alteration. *Atkinson v. Hawdon*, 2 A. & E., 628.

But when the debtor is not a party to the bill or note, it seems that he cannot require proof of a strict presentment of the instrument for payment, or that he had formal notice of dishonour, according to the custom of merchants, and cannot defend even where no presentment has been made, or notice given, if it appear that he was not thereby prejudiced. *Chitty on Contracts*, 3rd edit., p. 771, and cases there cited. And where a promissory note not payable to "order," and consequently not negotiable, is indorsed by a debtor to his creditor on account of a debt, and such note is dishonoured by the maker, the right to sue the debtor for the original debt revives, though no notice of the dishonour of the note has been given to the debtor. *Plimley v. Westley*, 2 Scott, 423; 2 Bing., N. C., 249.

If the plaintiff lose the bill or note either before or after it was due, so that he cannot produce it at the trial, he can neither maintain an action at law against his debtor upon the bill or note (even if the latter were the acceptor or maker thereof), or for the original debt; provided the instrument were at the time of the loss indorsed in blank, or otherwise negotiable by mere delivery, so that the instrument may possibly get into the hands of a bona fide holder, who could sue the debtor thereon. *Chitty on Contracts*, 3rd edit., p. 770. But when the purchaser of goods accepted a bill drawn in favour of the seller, who lost it before he indorsed

it, it was held that this was no defence in an action for the value of the goods. *Bolt v. Watson*, 4 Bing., 273.

Although the taking a bill or note generally operates in the way pointed out, leaving the plaintiff at liberty in the event of dishonour or non-payment, to proceed upon the original debt, *an express agreement*, nevertheless, by a creditor to take a bill or note, or the debtor's acceptance to a blank bill of exchange for the amount of his debt, as an *absolute* and unconditional *payment* or extinguishment thereof, destroys the right of action for such debt, and leaves the creditor without remedy, except upon the instrument. *Chitty on Contracts*, 3rd edit., 768, and cases there cited.

It seems that on taking from a debtor the bill of a third person, the omission to require the debtor's indorsement is not of itself sufficient proof that he was not to be liable for the precedent debt, if the bill were dishonoured. *Ibid*; and to make out such a defence, it has been held that where the plaintiff received a bill from the defendant, it is not enough that he ought in the ordinary course of dealing to have accepted it in discharge, if he did not in fact do so. *Hardman v. Bellhouse*, 9 M. & W., 596.

On the other hand, if the instrument be void on account of the insufficiency of the stamp, the creditor may sue for his debt, although he has taken a bill or note not due, provided no credit were originally agreed upon. *Cambridge v. Allenby*, 6 B. & C., 385. So, if it be a worthless bill, fraudulently passed to him, that is, if the parties thereto were at the time persons of no property, and the debtor were then aware that the instrument was of no value, and was concocted for undue purposes. *Stedman v. Cooch*, 1 Esp. R., 3. *Chitty on Contracts*, 3rd edit., 768. Where goods were sold to be paid for by E's bill on P, without recourse to the buyer in case of non-payment, and the vendee knew the bill to be worth knowing; it was held that the vendor could not sue for the price of the goods, but that his remedy was an action of *tort*. *Read v. Hutchinson*, 3 Camp., 352.

In the case of payment by bank notes, if the creditor takes provincial or country bank notes for his debt, and the bankers have failed, he may return the notes to the debtor within a reasonable time, instead of presenting them, *Rogers v. Langford*, 1 C. & M., 637. If a payment be made in forged bank of England notes, the creditor may treat them as a nullity, and sue his debtor for the demand. *Chitty on Contracts*, 3rd edit., p. 751.

Payment—through the post.]—When a creditor directs his

debtor to transmit money by the post, and it is lost, the creditor must bear the loss, if the letter was properly directed. *Warwick v. Noakes, Peake*, 67; *Walter v. Haynes, Ry. & M.*, 149; and where no directions are given about the mode of remittance, yet, if done in the usual way of transacting business, it seems that the debtor is discharged. *Per Lord Kenyon, C. J., ibid.* It has been ruled that if the letter is delivered to the bellman in the street, and is lost, it is no payment. *Hawkins v. Rutt, Peake*, 186. But this decision appears to be at variance with *Pack v. Alexander*, 3 *Moore S.*, 789. *Roscoe*, 6th edit., 324.

Payment to third party.—It is not always necessary to prove payment to the plaintiff himself. Payment to an agent, authorized to receive payments in the ordinary course of business, although he be known to be only an agent, binds the principal, if such payment be made before the principal requires payment to himself only. *Chitty on Contracts*, 3rd edit., p. 744. It is not necessary to prove that the agent paid the money to his principal. *Goodland v. Blewitt*, 1 *Camp.*, 477; *Coates v. Lewes, id.*, 444; *Owen v. Barrow*, 1 *N. R.*, 101.

The agent may be authorised to receive the money either by the express direction of the plaintiff, or by implication of law arising from the situation which he fills. Thus, payment to the plaintiff's attorney employed to obtain the debt, is as effectual as if made to the plaintiff himself; *Powell v. Little*, 1 *Bla. Rep.*, 8; but not to his clerk, who shows no other authority than his master's order to receive it. *Per Lord Kenyon, C. J., Coore v. Callaway*, 1 *Esp.*, 115. So payment to the attorney's agent who was employed by such attorney to sue the defendant, is no payment to the plaintiff. *Yates v. Freckleton*, 9 *Ves.*, 234. But payment to a person found in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the person was in fact never employed by him. *Barrett v. Deare, M. & M.*, 200; and see *Wilmott v. Smith, id.*, 238. Little-dale, J., expressed an opinion that an agent employed to sell has no authority, as such, to receive payment. *Mynn v. Jolliffe*, 1 *M. & Rob.*, 326; and see *Jackson v. Jacob*, 3 *Bing. N. C.*, 869; *Roscoe*, 6th edit., p. 323.

In some cases the debt is in law paid or extinguished by the creditor's express order upon his debtor to pay the money to a third person, to whom such creditor was indebted. Clearly the debt is absolutely discharged, if the order be acted upon, and the third party receive the amount in pursuance thereof; and the creditor cannot rescind the

order after the debtor has pledged himself to the third person, with the concurrence of the creditor, to obey it. In such case, the right of the third party to receive the money from the debtor is complete, and consequently the debt is extinguished as against the creditor. *Chitty on Contracts*, 3rd edit., p. 751.

If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the latter, instead of taking payment in money, takes payment in any other way, as by a bill, he does it at his peril. *Per Bayley, J., Smith v. Ferrand*, 7 B. & C., 24; but the taking a cheque payable immediately, instead of cash from the debtor's agent, does not discharge the debtor if the cheque be dishonoured, although the agent fail with funds of the debtor in his hands; *Everett v. Collins*, 2 Camp., 515.

An actual transfer of the amount of a debt in a banker's books from the account of a debtor to that of the creditor, with the assent of both, is equivalent to a payment. The plaintiff and defendant each kept an account with a banker at M. In October the plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote to the plaintiff, stating that he had caused the amount to be transferred to his account, and the plaintiff sent him a receipt by return of post. The sum, however, was not actually transferred until the 8th of December. On the 9th notice of the transfer was sent to the plaintiff by post, which did not reach him till the 11th. On the 10th the banker stopped payment. It was held that the transfer was equivalent to payment. *Eyles v. Ellis*, 4 Bing., 112.

The defendant who had ordered goods for ready money, paid for them by returning to the vendor's agent a dishonoured bill, accepted by the vendor; at first the agent declined to take the bill as payment, but having taken it to the vendor, who kept it, it was held that this was equivalent to payment, no fraud being proved. *Mayer v. Nias*, 1 Bing., 311.

In general only a money payment binds the principal, so that he is not affected by a set-off which the vendee may have against the agent—see *post*, *Set-off*; and although a traveller who receives orders for goods from his employer's customer in the country, is authorised to receive payment for them in money, he has not power to receive payment in other goods, or by bill; *Howard v. Chapman*, 4 C. & P., 508; *Sykes v. Giles*, 5 M. & W., 645; unless it were customary to settle by bill, *Ward v. Evans*, 2 Lord Raymond,

928; and see *Chitty on Contracts*, 3rd edit., p. 746. But there may be a payment to the creditor through his agent, by the debtor's giving the agent credit in account for the amount due, at least where a custom can be shown to accept such credits as payments, as is the case between brokers and underwriters. *Stewart v. Aberdeen*, 4 M. & W., 211.

That the defendant has paid the amount to a third person entitled to receive it, is sometimes a defence, although such third person is not authorised by the plaintiff.

Where the defendant alleged that the goods sold to him were the property of a deceased person, that the plaintiff at the time of sale represented himself to be the executor, and that subsequently the administrator claimed the amount, to whom the defendant paid it, this was held to be a good defence. *Allen v. Hopkins*, 13 L. J. Ex., p. 316.

Payment to one of several plaintiffs.—Payment to one partner is payment to all, and a receipt by one is *prima facie* evidence against all; but if one of several plaintiffs, or a nominal plaintiff suing for another person beneficially interested, fraudulently and by collusion with the defendant give him a receipt for the debt, without any money or other consideration passing between them, the plaintiff may shew the circumstances of fraud under which it was given. *Farrar v. Hutchinson*, 9 A. & E., 641.

Payment by third party.—If a stranger out of his own monies pay a creditor part of his demand, under an express agreement that it shall be received in full satisfaction of all claims on the debtor, the creditor cannot afterwards maintain an action for the remainder of his demand; as this would be a fraud on the third person, who discharged part of the debt under the impression that he thereby released the debtor from the residue. See *Lewis v. Jones*, 4 B. & C., 506, 514. See ante, p. 51, as to orders and cheques on third party.

Application of payments.—Where the fact of a payment of a sum of money can be proved or is admitted, the question between the parties often is as to whether the sum so paid was paid or received on account of the particular demand sought to be recovered by the plaintiff.

In general, the party who pays money has a right to direct the application of it; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to which of those demands he pleases. *Hall v. Wood*, 14 East, 234 (N.) The creditor need not apply it to any particular demand at the moment of payment, but has a right to make

the application at a subsequent period; nor will an entry in his books, applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. & C., 65. See also *Grigg v. Cocks*, 4 Simons, 438. It has been decided that the creditor may apply the payment to the discharge of a *prior* purely equitable demand, and sue his debtor at law for the subsequent legal debt; *Bosanquet v. Wray*, 6 Taunt., 597; but see *Birch v. Tebbutt*, 2 Stack., 74; but a general payment must be applied to a prior legal, and not to a subsequent equitable demand; *Goddard v. Hodges*, 1 C. & M., 33. The creditor may apply a payment to a debt barred by the Statute of Limitations; though such payment will not take the whole debt out of the Statute. *Mills v. Fowkes*, 5 Bing. N. C., 455; *Roscoe*, 6th edit., p. 324.

But if at the time the debtor makes the payment he declare that it is specifically made in discharge or part liquidation of a particular account, or the circumstances show or raise an inference that such was his intention, the creditor is bound thereby, and cannot ascribe it to his other demand. It is not essential that there should have been an *express declaration* by the debtor at the time of payment to which of the two accounts he intends the payment to be made. The creditor's right of election may be obviated, if it can be clearly collected from other circumstances than an express declaration, that the debtor intended at the time of payment to appropriate it to a specific account. *Chitty on Contracts*, 3rd edit., p. 753. And if a debtor, at the time of making a payment, make an entry in a book, stating such payment to be on a particular account, and show such entry to the creditor that would be evidence of an appropriation by the debtor. *Frazer v. Bunn*, 8 C. & P., 764.

There are cases in which, although the payment be general, the creditor is not allowed to ascribe his receipt of the money to which account he pleases, and where payments are made upon one entire account, or on separate accounts treated as one entire account by both parties, they are to be considered as payments in discharge of the earlier items. *Per Bayley J. Bodenham v. Purchas*, 2 B. & Ald. This rule is not, however, conclusive, but is only evidence of an appropriation. *By Denman, C. J., Wilson, v. Hirst*, 4 B. & Ald., 766.

When A has a demand against B as executor, and also another demand against him in his own right, and B makes a general payment, A cannot apply it to the former demand;

but where the party paying is indebted to the party receiving for a sum due from his wife before she was married, and also on another demand, the party receiving may apply the money to the first demand. *Goddard v. Cox*, 2 *Str.*, 1194. Where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Laing*, 3 *B. & C.*, 165. But where one of the demands is for spirituous liquors supplied in quantities not amounting to 20s. at a time, *vide ante*, p 41; the party receiving the money may apply it to that demand; the Statute 24 Geo. II., c. 40, only preventing the seller from maintaining an action. *Cruickshanks v. Rose*, 1 *M. & Rob.*, 100. And in such a case the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand, and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 2 *A. & E.*, 41.

In some instances besides those above-mentioned, the law will direct the application of money paid generally. Thus, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners must be applied to the old debt. *Per Bayley, J., Simson v. Ingham*, 2 *B. & C.*, 72; *Brooke v. Enderby*, 2 *B. & B.*, 71. So payments by a debtor to surviving partners from time to time upon one general account, including an old debt due to the former firm, are to be applied in the first place to such old debt. *Bodenham v. Purchas*, 2 *B. & Ald.*, 39. But where the old debt is not brought into the new account, general payments on the new account are not to be considered as made in discharge of the old debt. *Simson v. Ingham*, 2 *B. & C.*, 65. And where there are distinct demands, one against persons in partnership, and another against one only of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown, Moo. & M.*, 40; *Roscoe*, 6th edit., p. 324.

Proof of payment.—The foregoing facts constituting payment are so various as to render it desirable to state the mode of proof applicable to each class of facts.

Where the payments were made in cash to the plaintiff, the party making them should be called. If the defendant himself was the person, he (*see ante, Evidence for the Plaintiff*) may give evidence of the fact, but in all cases where he is

a witness it will be desirable to give some confirmatory evidence.

Receipts.]—If the plaintiff gave a receipt for the money the proof of his handwriting will be sufficient without actual proof of the payment, but parol (or verbal) evidence of the payment by any one who saw the money paid *may* be given in addition or instead. *Rambert v. Cohen*, 4 *Esp.*, 213; for where a writing is not the fact itself to be proved, and not made an appropriate instrument of evidence by private compact, nor required by law, there is no reason why it should exclude oral or other evidence. It often happens that an oral communication is accompanied by one in writing to the same effect, yet the oral communication may be received, provided it be adduced, not to prove the contents of the writing and in substitution of it, but as independent evidence. It is on this ground that the payment of money may be proved by oral evidence, though a receipt be taken. *Phillips*, 9th edit., vol. i., p. 428. Where a receipt was, in fact, given, it should be produced, otherwise observations may be made by the opposite party on the fact of its being withheld; and of course the *contents* of the receipt, *i. e.*, what is stated in the receipt cannot be proved, except by production of the receipt itself. See *ante*, *Evidence for the Plaintiff*.

In general, a receipt not under seal is only a *prima facie* acknowledgement that the money has been paid, and therefore may be contradicted or explained. *Graves v. Key*, 3 *B. & Ad.*, 318. A receipt for money is an admission of great weight against a party, but not conclusive; and there is no legal objection to his shewing, if he can, that the money was not received, or that he gave the receipt under a misrepresentation. *Phillips*, 9th edit., vol. i., p. 368. It was however held, both by Lords Kenyon and Ellenborough, that a receipt in full of all demands, given with a knowledge of all the circumstances, is conclusive, though there was no payment in fact. *Bristow v. Eastman*, 1 *Esp.*, 172; *Alner v. George*, 1 *Camp.*, 392. *Roscoe*, 6th edit., p. 39.

Stamp on Receipts.]—The receipt, if produced, must be properly stamped. The schedule to the Stamp Act imposing the duty on receipts provides, that "any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand therein specified, and amounting to two pounds or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged, or satisfied, or which

shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person shall be deemed and taken to be a receipt for any sum of money of equal amount with the sum, debt, or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied within the intent and meaning of this schedule, and shall be charged with a duty accordingly.

"And any receipt or discharge note, memorandum, or writing whatever, given to any person for or upon the payment of money which shall contain, import, or signify any general acknowledgment of any debt, account, claim, or demand, debts, accounts, claims, or demands, whereof the amount shall not be therein specified having been paid, settled, balanced, or otherwise discharged or satisfied, or whereby any sum of money therein mentioned shall be acknowledged to be received in full, or in discharge or satisfaction of any such debt, account, claim, or demand, debts, accounts, claims, or demands, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for the sum of 1000*l.*, or upwards, within the intent and meaning of this schedule, and shall be charged with the duty of ten shillings accordingly.

"And all receipts, discharges, and acknowledgments of the description aforesaid, which shall be given for or upon payments made by or with any bills of exchange, drafts, promissory notes, or other securities for money, shall be deemed and taken to be receipts given upon the payment of money within the intent and meaning of this schedule."

Receipts upon bills of exchange, promissory notes, and cheques, upon the same being duly paid; receipts upon bank notes, and letters by the General Post acknowledging the safe arrival of bills of exchange, notes, or other securities for money, are exempt from stamp.

A bill containing an account of debits and credits and *bonâ fide* made at one time, to be delivered to the defendant as shewing the balance against him, is inadmissible in evidence for the defendant as to the payment, without a receipt stamp. *Williams v. Smith*, 2 *B. & B.*, 501, 502, *note*. An unstamped receipt, though not of itself admissible in evidence, may be shown to a witness as a memorandum made by him, in order to refresh his memory as to the fact of payment in his presence, and it suffices that he swear that he has no doubt, from the circumstance of his having made the memorandum, that the money was paid as stated in the

memorandum, although he add that he cannot recollect the fact. *Maugham v. Hubbard*, 8 B. & C., 14.

If the payment was made by a bill or promissory note, and the instrument is in the plaintiff's possession, notice should be given to him to produce it, and if he does not comply with it, the defendant should be prepared with secondary evidence of the fact.

It has been previously stated that it is not necessary for the defendant to show that a bill of exchange was paid. If it was dishonoured, the plaintiff must prove that fact.

Where the payment has been made through the post, and it is not necessary to prove the actual receipt of the money (*ante* p. 57), notice should be given to the plaintiff to produce the letter enclosing it. Where money has been sent in this way, it often happens that there is no way of proving the fact but by the evidence of the defendant himself. In that case he should endeavour to corroborate his testimony by some evidence, such as the posting of the letter, &c.

If the payment was made by a post office order, the post-masters should be applied to, to obtain proof of the obtaining and payment of the order.

Where the money is paid to a third party whose duty it was to give it to the plaintiff, the defendant must prove the payment, and that the party was authorized to receive it. If the plaintiff in fact instructed the defendant to pay the money in that particular way, proof of that order coupled with the payment will be sufficient. In the absence of such express direction, the general authority of the third party as the plaintiff's agent must be proved, but if that third party had neither an express or implied authority to receive the money, it will be incumbent upon the defendant to show the actual receipt of the money by the plaintiff.

It is to be observed that where the plaintiff's particulars of demand admit a payment, he can recover only the amount by which his claims as proved exceed the payment. *Rouland v. Blaksley*, 1 Q. B. Rep., 403; *Price v. Rees*, 11 M. & W., 576. Where the particulars claimed a balance of 29*l.* for goods sold, giving credit for 920*l.* paid; and the plaintiff proved a claim of 949*l.* for goods sold, and it appeared that 84*l.* worth of the goods had been taken back, it was held that the plaintiff might turn the balance in his favour by showing that he had given credit for 84*l.*, as part of the payment. *Lamb v. Mickleton*, 1 Q. B. Rep., 400. Where the particulars

of demand stated the action to be brought "to recover the sum of 37*l.*, being the balance of the following account," and then followed various items for goods sold amounting to 108*l.*, but no credit was given in express terms for any sums which reduced the 108*l.* to 37*l.*; and at the trial the plaintiff proved, by the admission of the defendant that a balance of 37*l.* odd was due, and though defendant proved a set-off of 5*l.*, and contended that the set-off was applicable to so much of the balance claimed by the particulars, and that therefore the 5*l.* should be deducted from the 37*l.*, it was held that it was a question for the jury to say whether the balance claimed meant a sum, after giving credit for the 5*l.* set-off. *Townson v. Jackson*, 2 D. & L., 369. See further on this subject, *Mosley's County Courts*, p. 313.

TENDER.

If the defendant has made a legal tender to the plaintiff before the commencement of the action, of the amount due, it is a good defence, upon the principle that the defendant has been always ready to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it. *Dixon v. Clarke*, 16 L. J., C. P., 232. The debt, however, is not discharged or extinguished by such tender and refusal, but it bars the claim to damages, and interest for not paying, and the costs of the action. As the plaintiff is still entitled to the debt, the defendant must be ready at the trial with the amount tendered ready to be handed over to the plaintiff, if he admits the tender, or the defendant proves it. In either case the defendant will be entitled to the costs of the action, and the judge will probably order them to be paid out of the sum tendered. See 1 *Saunders*, 33 b, note (2).

The effect of the tender is to admit a claim by the plaintiff to that amount. It has been doubted whether in an action in the superior courts, the plea of a tender of part of the sum claimed in the declaration, there being only one contract proved, admits the contract, but in actions in the County Court, where there are no pleading, it is submitted that where the defendant disputes his liability to more than a certain part of the sum claimed, and alleges a tender of that, the plaintiff, unless he waives his claim to everything beyond the amount tendered, must prove the contract, although it be in its nature entire, as, for example, if the goods were delivered under a written contract, he must prove the agreement. Indeed, as the defendant is not

bound to give notice of this defence, it seems he may call upon the plaintiff to prove his case before he sets up this kind of defence.

Tender, in what kind of money.—By stat. 56 Geo. III., c. 68, s. 11, the gold coin of the realm was declared to be the only legal tender for payments (except as thereafter provided), within Great Britain and Ireland. And by sect. 12, no tender of payment of money made in the silver coin of the realm, of any sum exceeding the sum of 40s., at one time shall be a legal tender. By stat. 3 & 4 W., IV., c. 98, s. 6, however, notes of the Bank of England payable to the bearer on demand, are made a legal tender for all sums above five pounds.

It seems that a tender in copper is not sufficient, except for a fractional part of a shilling, 1 *Bla. Com.*, 277.

A tender of a country bank note is good, where the creditor objects only to the *quantum*, and not to the quality of the tender. *Polglass v. Oliver*, 2 C. & J., 15; *Lockyer v. Jones, Peake*, 180 (n.) So a tender of a banker's cheque in the like circumstances. *Jones v. Arthur*, 8 Dowl. 442; *Roscoe*, 6th edit., p. 331.

Amount tendered.—It is a clear rule that the debtor must tender the full amount of the debt. A tender of part is, in law, a nullity, a creditor not being bound to accept less than the whole of his demand. *Chitty on Contracts*, 3rd edit., p. 796; *Dixon v. Clark*, 16 L. J., C. P., 237.

But the tender may in general be of the debt or amount due to the plaintiff at the time of the tender, so that if the original debt has been reduced by payment, or if the defendant has a claim of set-off as to part, he may tender the balance, and prove at the trial the payment or set-off to cover the residue; and if the claim consists of divers *distinct* debts or sums of money, the defendant may make a tender of any one of the sums, and it will be an answer to the action in respect of the particular debt to which the tender related. *Bac. Ab.*, *Tender*.

If a man tenders more than he ought to pay, it is good; for the other ought to accept so much as is due to him. *Wade's case*, 5 Rep., 115, c.; *Dean v. James*, 4 B. & Ad., 548. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5l. note, requiring change, is not good. *Betterbee v. Davis*, 3 Camp., 70; *Robinson v. Cook*, 6 Taunt., 336; *Walkins v. Robb*, 2 Esp., 711; *Brady v. Jones*, 2 D. & R., 305. But if in such case the creditor do not object to the *tender on that account*, but merely demand a larger sum, the tender appears to be good.

Black v. Smith, *Peake's R.*, 88; *Saunders v. Graham*, *Gow's R.* 121.

Where the defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good. *Bevans v. Rees*, 5 *M. & W.*, 306.

Where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all, not distinguishing the claims against each, is not a good tender of any one of the debts. *Strong v. Harvey*, 3 *Bing.*, 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglass v. Patrick*, 3 *T. R.*, 683; *Roscoe*, 6th *edit.*, p. 331.

The money must be actually produced.—The actual production of the money due, in monies numbered, is necessary, unless the creditor dispenses with the production of it at the time, or does anything which is equivalent to that. *Per Lord Ellenborough*, *Thomas v. Evans*, 10 *East*, 101. The mere refusal to take money is not a sufficient waiver of the necessity of showing and actually offering it to the creditor, for although he might refuse the money at first, yet the production of it might induce him to receive it. To supersede the production of, and actual offer of the money, the creditor must expressly say, on being told that the debtor had the money ready, that he need not produce it, or use equivalent expressions. *Chitty on Contracts*, 3rd *edit.*, p. 797.

Thus, where the defendant left 10*l.* with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l.*, nor anything less than his whole demand, but the clerk did not offer the 10*l.*, this was held to be no tender. *Ibid.*, and see *Dickinson v. Shae*, 4 *Exp.*, 68. But where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good. *Douglas v. Patrick*, 3 *T. R.*, 684; and see *Ryder v. Townsend*, 7 *D. & R.*, 119. The agent of the defendant met the plaintiff in the street, and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said

he would not take it; the witness then said he would give him the other 10s. out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of 4*l.* 10*s.* *Read v. Golding*, 2 *M. & S.*, 86. Where a witness stated that the defendant was willing to give the plaintiff 10*l.*, and that she (the witness) offered to go up stairs, where the money was, and fetch that sum, but that the plaintiff said, "she need not trouble herself, for he could not take it," this was held by Best, C. J., to be a good tender. *Harding v. Davies*, 2 *C. & P.*, 77.

Where the production was prevented by the creditor leaving the room after the debtor had offered to pay the money, and while he was in the act of taking it from his pocket, Lord Tenterden, C. J., thought there was not a sufficient tender. *Leatherdale v. Sweepstone*, 3 *C. & P.*, 342. The defendant ordered A to pay the plaintiff, 7*l.* 12*s.*; the latter demanded 8*l.*, on which A said that he was only ordered to pay the former sum, which was in B's hands. B puts his hand in his pocket to take out the money, but did not do so by A's desire. At the trial B could not say whether he had sufficient money about him on the above occasion to pay the 7*l.* 12*s.*, but swore that he had it in his house, at the door of which he was standing at the time. The court held that this was not a valid tender, as the money should have been actually produced. *Kraus v. Arnold*, 7 *Moore*, 59.

On a plea of tender of 1*l.* 12*s.* 6*d.* the jury found specially that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 6*d.*, which the defendant owes you:" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it; the matter is now in the hands of my attorney." It was held that, upon this finding, the defendant was not entitled to judgment. *Finch v. Brook*, 1 *Bing.*, *M. C.*, 253; 1 *Scott*, 70, *S. C.* But the court seem to have been of opinion that a dispensation from the production might have been implied from the above facts, and found by the jury. *Roscoe*, 6*th* edit., p. 332.

The tender must be unconditional.—In order to support the defence of tender, there must be evidence of an unqualified offer not clogged by any condition. Thus a tender of a sum of money as "all that is due," *Sutton v. Hawkins*, 8 *C. & P.*, 259, or, "as a settlement of the account," would be bad; if in the latter instance from the expression set-

tlement, the sum tendered was to be taken as a compromise of the plaintiff's claim and not merely in payment, *Eckstein v. Reynolds*, 7 A. & E., 80; *Gordon v. Cox*, 7 C. & P., 172. And a tender of money "as the balance due" is not sufficient. *Evans v. Judkins*, 4 Camp., 166; *Hough v. May*, 4 A. & E., 954. But a tender is not vitiated by the debtor's saying at the time of making it, that it was all he considered due. *Robinson v. Feneday*, 8 C. & P., 752; *Chitty on Contracts*, 3rd edit., p. 800. Where the defendant tendered a sum of money, and at the same time delivered a counter claim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "you must go to my attorney," the tender was held insufficient; *Brady v. Jones*, 2 D. & R., 305. But the correctness of this decision may be doubted, unless the retainer of the counter claim was meant to be a condition. *Roscoe*, 6th edit., p. 333. But a tender accompanied by a statement by the defendant, that "he was come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz., that the debtor intends it to cover the whole demand, and asserts that it does so. *Henwood v. Oliver*, 1 Q. B., 409. Where a tender is accompanied with a demand of a receipt in full of all demands it is insufficient, *Glasscott v. Day*, 5 Esp., *Ryder v. Townsend*, 7 D. & R., 119. But, though a party tendering money cannot, in general, demand a receipt for the money, yet where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good. *Richardson v. Jackson*, 8 M. & W., 298. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, *Abbott, C. J.*, held this to be no proof of a tender. *Laing v. Meader*, 1 C. & P., 257; the proper course is to pay the money and then demand a receipt, and if the latter refuses he is liable to a penalty, by 43 Geo. III., c. 126, s. 4. 5. It is, however, not clearly settled that a tender, requiring a receipt, is not a good one. See *Richardson v. Jackson*, *supra*. *Roscoe*, 6th edit. p. 333. Where a debtor made a tender to his creditor by sending him a cheque contained in a letter requesting a receipt in return, this was held not to make the tender conditional, *Coleridge, J.*, observing, "The defendant put the cheque entirely out of his power by sending it in a letter, and he merely requests the plaintiff to send him a receipt, which was not a condition." *Jones v. Arthur*, 8 Dowl., 442.

If the creditor refuse to receive the sum tendered, unless the debtor will comply with a condition imposed by the former, this will not accept the validity of the tender. *Devans v. Rees*, 5 M. & W., 306.

Whether a tender be conditional or not, is generally a question for the jury. *Eckstein v. Reynolds*, 7 A. & E., 80.

By whom a tender must be made.]—The tender need not be made by the debtor himself; it is sufficient if made by his agent or third person, by his desire and on his behalf, and a tender by an agent, at his own risk, if more than the money given him by his principal, is good. *Read v. Goldring*, 2 M. & S., 86.

Where the tender is by a stranger without the knowledge of the debtor, it seems the subsequent assent of the debtor would make the tender valid. See *Harding v. Davis*, 2 C. & P. 77; and any person may make a tender on behalf of an idiot.

To whom a tender must be made.]—A tender need not be to the creditor personally. If made to a person authorized by the creditor to receive money for him it is sufficient. *Goodland v. Blewith*, 1 Camp., 477; *Kirton v. Braithwaite*, 1 M. & W., 310. And where a clerk, who was in the habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, [assigning the reason, it was held to be a good tender to the principal. *Moffatt v. Parsons*, 5 Taunt., 307. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 1 Nev. & M., 398. After an attorney has been authorized by his client, the creditor, to apply for payment, and has accordingly written to demand it, a tender to such attorney will be valid; and a tender to a person in the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and who refuses the tender only as being of an insufficient sum, is a good tender, without shewing who that person was. *Wilmott v. Smith*, M. & M., 238. So a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money. *Barrett v. Deere*, *ibid.*, 200. But it is otherwise when the payment is not connected with the plaintiff's business, but quite collateral to it. *Sanderson v. Bell*, 2 C. & M., 304. Where the money was brought to the house of the plaintiff, and delivered to

his servant, who retired, and appeared to go to his master, it was held to be evidence for the jury, from which they might infer that a tender was made. *Anon.*, 1 *Esp.*, 349. If there be several creditors to whom the money is jointly due, a tender to one of them is good. *Douglas v. Patrick*, 3 *T. R.*, 683.; *Roscoe*, 6th edit. p. 330.

When made.—The tender must be made before the actual commencement of the action for the recovery of the debt; that is to say before the issuing of the summons. But a tender is good if made before the summons was issued; although before the tender the creditor had employed an attorney to sue the debtor, and the attorney had written a letter to the debtor demanding payment, and had applied for the summons. *Briggs v. Calverly*, 8 *T. R.*, 629; *Moffat v. Parsons*, 5 *Taunt.*, 307; and the tender cannot be defeated by the creditor issuing a summons at a subsequent hour of the same day. *Kirton v. Braithwaite*, 1 *M. & W.*, 310.

Evidence for the plaintiff in reply.—The plaintiff may either deny the tender or contest its formality; or admit the tender and proceed for a larger sum due; or he may set up a prior or subsequent demand and refusal of the money, for as the debtor must have been always ready to pay the money, the plaintiff may get rid of the effect of a tender, by showing that either before or after the time the tender was made, he demanded the sum tendered, and the defendant refused to pay it.

The demand must in general be proved to be of the precise sum tendered. *Rivers v. Griffiths*, 5 *B. & A.*, 630. But if the plaintiff can show that at the time of the tender, there was owing from the defendant to the plaintiff a larger indivisible sum than that tendered on an entire contract, and which larger sum he demanded, the effect of the tender is got rid of. *Dixon v. Clarke*, 16 *L. J., C. P.*, 237; for if the plaintiff can shew that an entire performance of the contract was demanded and refused at any time, when by the terms of it he had a right to make such a demand, he will avoid the tender. Hence if a demand of the whole sum originally due is made and refused, a subsequent tender of part of it is bad, notwithstanding that by part payment or other means, the debt may have been reduced in the interim to the sum tendered. If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the averment that the defendant was *always ready to pay*, even though the amount demanded were made up of the sum due under the contract and some other debt due from the defendant to the plaintiff;

but in that case this principle is only applicable where the larger sum is demanded *generally*, and could hardly be enforced were it explained to the defendant at the time how the amount demanded is made up, for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *always ready* as to each. *Ibid.*

The demand must be by a person authorized to receive the money, and therefore a demand by the clerk of the plaintiff's attorney (who does not bring his master's receipt) is insufficient. *Coore v. Callaway*, 1 *Esp.*, 115. A subsequent demand upon one of two joint debtors is sufficient. *Peirse v. Bowles*, 1 *Stack.*, 322. A letter written by the plaintiff's attorney, and received by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for at the time of the demand, the defendant should have an opportunity of paying the sum demanded. *Edwards v. Yates*, *R. & M.*, 360; *Roscoe*, 6th *edit.*, p. 333. The demand ought to be a *personal one*; but if the demand were made at the debtor's residence during his absence, it would be necessary to defer issuing the summons until the debtor had reasonable time and opportunity to pay the money. *Gibbs v. Stead*, 8 *B. & C.*, 528.

SET-OFF.

A set-off means a cross debt, for which an action might be maintained by the defendant against the plaintiff; and is very different from a mere right to a reduction of his demand or claim to defeat it, on account of some matter connected therewith.

The defence of set-off does not exist at common law: it is founded on the Statute 2 Geo. II., c. 22, s. 13, (made perpetual by the Statute 8 Geo. II., c. 24, s. 4,) by which it is enacted, that "where there are *mutual debts* between the plaintiff and the defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." *It*

The 5th Section of the 8 Geo. II., provides that by virtue of the preceding clause, mutual debts may be set off against each other, as before mentioned, although such debts be of a *different nature*.

When the defendant desires to set-off any debt or demand alleged to be due to him by the plaintiff, he must give notice thereof in writing to the clerk of the court, and de-

liver to such clerk two copies of a statement of the particulars of such set-off, five clear days before the return of the summons; and the clerk shall give to the plaintiff a notice of such set-off, together with one of the copies of such particulars of set-off; but where such notice shall not have been given, the judge in his discretion, and on such terms as he shall think fit, may adjourn the hearing of the cause to enable the defendant to give such notice such number of days before the day to which the hearing may be adjourned, as the judge shall think proper. *Rules of Practice*, 17, 18.

As to the proof of such notice, *see ante*, p. 31.

It is not compulsory on the defendant to avail himself of his right of set-off: he may satisfy the plaintiff the whole of his debt, and then resort to an action for the money due from the plaintiff; but if the evidence of the debt claimed to be due from the plaintiff to the defendant be doubtful, the fact of the defendant's having omitted to set it off when he had an opportunity, might induce the jury to find against the demand. If the defendant's set-off exceed the plaintiff's demand, an action lies for the surplus. *Chitty on Contracts*, 3rd edit., p. 843.

To what claims on the part of the plaintiff, the defendant may shew a set-off.—The statutes of set-off do not apply except in the case of mutual debts; that is, to claims in the nature of a debt, reduced or reducible to a certain or specific pecuniary amount, and recoverable in an action on contract. *Morley v. Inglis*, 4 Bing. N. C., 58. If the contract upon which the plaintiff sues be such as might entitle the plaintiff to recover special damages, the statutes of set-off do not apply. *Hardcastle v. Netherwood*, 5 B. & Ald., 93.

Where upon a contract for the sale of goods or for work, &c., it is expressly agreed that the price shall be paid in ready money at the time of the delivery of the goods, the seller has a right to retain them until the price is paid although he is indebted to the purchaser in a larger amount; but if he parts with the goods he loses his *lien*, and then in suing for the price the defendant's set-off will be let in, for it is no answer to a set-off in an action for goods sold and delivered, to say that the defendant agreed to pay ready money. *Eland v. Karr*, 1 East, 375. Upon such a contract the defendant may even set off a bill of exchange accepted by the plaintiff, of which the defendant had become the holder after the sale and before the delivery of the goods. *Comforth v. Rivett*, 2 M. & Sel., 510.

Nature of the debt, set-off.—The demand intended to be set off must be of a liquidated nature. *Freeman v. Hyett*, 1

that of *Stacy v. Decy*, *supra*. *Gordon v. Ellis*, 2 M. G. & S., 821.

A person who is sued for his own debt, cannot set off a debt which accrued to him in his representative character. *See post*, *Actions by and against executors, &c.*; and as to set-off of debts due from the principal, in actions by agents, *see post*, *Goods sold by third parties*.

In an action against a husband for his own debt, he is not allowed to set off a debt due to him in right of his wife. *Paynter v. Walker*, *Bul. N. P.*, 179. Nor can a debt due from the plaintiff's wife before she was married be set-off against an action by the husband only, unless the latter has on some new consideration made the debt his own, so that the wife would not be a necessary party to an action for the recovery of the demand. *Wood v. Akers*, 2 *Esp. Rep.*, 594.

Particulars and proof of set-off.—It is only necessary to give notice and particulars of set-off where there are cross demands; for where the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts, and credits, the *balance* only is the debt. *See Green v. Farmer*, 4 *Burr.*, 2221; and *Le Loir v. Bristow*, 4 *Camp.*, 134.

The rules as to the particulars of a plaintiff's demand are applicable to particulars of set-off. *See ante*, p. 13.

Where the particulars of set-off claimed on an "acceptance" of the plaintiff, and it was in fact an indorsement by him, the variance was held immaterial, the amount and the date being sufficient to prevent the plaintiff from being misled. *Parsons v. Wilson*, 3 M. & G., 445.

The allowance of a set-off on the plaintiff's particular will not, it seems, dispense with a notice of set-off, but will be evidence of it when notice of set-off has been given. If, however, the defendant uses the particular for this purpose, the whole account, as stated by the plaintiff in it, must be submitted to the jury. *Rowland v. Blaksley*, 1 *Q. B.*, 403.

When the defendant, under a plea of set-off, put in an account rendered to him by the plaintiff, by which he charged himself with items due to the defendant; and on the other side of the account were items due to the plaintiff for costs as an attorney, which costs were not the subject of the action, and for which no signed bill had been delivered, but being included in the account left a balance due to the plaintiff; it was held that the plaintiff was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it. *Harrison v. Turner*, 16 *L. J.*, *Q. B.*, 295.

The defendant must in general, however, prove the items of his set-off in the same manner as a plaintiff must prove his claim in respect of the same subject-matter. For example, if the set-off is for goods sold, work and labour, and money lent, the evidence must be such as he would be bound to produce if he were suing for the recovery of the debt claimed to be due to him.

Where the defendant set off a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person which had been previously granted by the defendant, and upon which a certain sum was in arrear; it was held that the defendant was not bound to prove that he had paid the money, in order to set it off, but that on production of the bond, the plaintiff was bound to prove payment, *Penny v. Foy*, 8 B. & C., 11; but proof of the delivery and payment to the plaintiff of a cheque on the defendant's banker is not sufficient evidence of a debt in order to support a set-off, unless it be shewn upon what consideration, and under what circumstances, the cheque was given. *Aubert v. Walsh*, 4 Trunt., 293.

In the superior courts a verdict against a defendant on a plea of set-off stops him from bringing an action against the plaintiff for the same demand.

Evidence for the plaintiff in reply.—Where the defendant gives notice of a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance; and, on the defendant establishing his set-off, may prove other parts of his account to cover it. *Williams v. Davies*, 1 C. & M., 464.

The plaintiff of course may set up any of the defences to the set-off and the items composing it; which a defendant can do to a plaintiff's claim in respect of the same causes of action.

STATUTE OF LIMITATIONS.

The Statute of Limitations, or as it is sometimes called, "The Statute," is the 21 James I., c. 16; under which it is a good defence to any action or simple contract, whether founded on a verbal or written agreement, that the cause of action arose more than six years before the commencement of the suit. Section 3 of the Statute enacting, that all actions upon the case of debt, and grounded on any lending or contract, without speciality, and all actions of debt for arrearages of rent, shall be commenced within six years after the cause of action.

In an ordinary action for goods sold and delivered, the Statute begins to run, that is to say, the six years are to be

counted from the delivery of the goods. But where goods are sold upon credit for a stipulated period, the Statute begins to run from the expiration of that period. Where goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option, it was held (*Parke, J., dubitante,*) that an action for goods sold and delivered, commenced within six years from the end of the nine months, was brought in time to save the Statute. *Helps v. Winterbottom*, 2 B. & Ad., 431.

Where *all* the items of a written account are *on one side*, as an account between a tradesman and his customer, the circumstance of there being some items of the bill within six years, will not defeat the Statute as to those that are of longer standing. *Cotes v. Harris, Bul., N. P.*, 149.

As the defence turns upon the simple fact of the period of the delivery of the goods, which the plaintiff must prove, the defendant will seldom be in a situation to, or under the necessity of, calling witnesses. Indeed, the period of the delivery of the goods is one seldom capable of being disputed, and the real question generally is, whether the defendant has done any act subsequent to the delivery which renders the Statute inapplicable. *See infra*. The judge of the County Court will take judicial notice of the Statute.

The defendant, however, is required to give five days' notice of this defence to the clerk of the court, as in infancy, coverture, set-off, &c., *vide ante* p. 31.

Accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, are excepted from the operation of the Statute of Limitations. But this exception extends only to cases where an action of account would lie, *Cottam v. Partridge*, 4 M. & G., 271; and therefore does not require to be further noticed in this work.

Evidence for the plaintiff in reply.—The effect of the Statute of Limitations may be avoided by proof of an acknowledgment of the debt within six years of the commencement of the action.

This acknowledgment may be of two kinds; either an acknowledgment or promise in writing signed by the defendant; or part payment of the debt, which is an acknowledgment of its existence.

It lies upon the plaintiff to prove the acknowledgment where it has been made.

An acknowledgment or promise in writing.—A verbal promise was formerly sufficient to obviate the Statute; but by Statute 9 Geo. IV., c. 14, commonly called Lord Ten-

tarden's Act (reciting the Statute of Limitations, 21 James I., c. 16, and that various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, &c.,) it is, by Section 1, enacted, that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by, or in some writing, to be signed by the party chargeable thereby."

Before this Act, promises, or acknowledgments implying promises, took a case out of the Statute, and this Act has made no other change in the law in this respect than by requiring such acknowledgment or promise to be in writing signed by the party chargeable. The intention of the Statute was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. No alteration is introduced in the form of the acknowledgment or promise, or with regard to the party to whom it is to be made. The inquiry, therefore, in a given case, whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved, before the Statute, to have been spoken by the defendant, would have had a similar operation and effect. *Per Tindal, C. J., Haydon v. Williams*, 7 Bing., 163; 4 M. & P., 811, S. C.

The former decisions are therefore still to be considered as authorities. No particular form is specified: a paper signed by the defendant, though without date, address, or amount due, will be sufficient. *Hartley v. Wharton*, 11 A. & E., 934. The acknowledgment must be such as will raise an implication of a promise to pay; and there must be either an express promise to pay, or an acknowledgment of the debt in terms so distinct and unqualified, that a promise to pay can reasonably be inferred. A mere acknowledgment is not sufficient to take a case out of the statute, unless there be a promise to pay. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay, may, and ought to be implied; but where the party guards his acknowledgment, an implication will

was, "I cannot pay the debt at present, but I will pay it as soon as I can," the Court of King's Bench held that it was necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 B. & C., 603. And see *Ayton v. Bolt*, 4 Bing., 105. *Haydon v. Williams*, 7 Bing., 163. *Roscoe*, 6th edit., p. 321.

Whether the promise be qualified or not, is a question of construction for the court, and not for the jury, except where extrinsic evidence affecting the construction is adduced in explanation. *Routledge v. Ramsay*, 8 A. & E., 221.

What not sufficient acknowledgment.]—It is not sufficient that the document contains a promise by the defendant to pay when he is able, or by bill, or a mere expectation that he shall pay at some future time. Upon this ground the following letter by the defendant to a clerk of the plaintiff in answer to one applying for payment of a debt was held insufficient to defeat the statute. "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events a portion of the debt, when we shall settle about the liquidation of the balance." *Hart v. Prendergast*, 15 L. J. Ex., 223. This case certainly comes very near that of *Bird v. Gammon*, noticed ante p. 81.

Where, in answer to a letter from the plaintiff's attorney, the defendant wrote, "Sir, as soon as I am able to attend to my concerns, I shall wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us;" this was not sufficient to take the case out of the statute. *Craig v. Cox*, *Holt N. P. C.*, 380. So, where, in answer to a demand for charges relative to the grant of an annuity, the defendant said, "He thought it had been settled at the time the annuity was granted; that he had been in so much trouble since that he could not recollect anything about it." *Helings v. Shaw*, 1 B. Moore, 340; 7. *Taunt*, 611, *S. C.* So where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now." *Snook v. Mears*, 5 Price, 636. So where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability." *Bicknell v. Keppel*, 1 New Rep., 20. Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," and the jury negatived the acknowledgment, the court refused a new trial. *Knott v. Farren*, 4 D. & R., 179. So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. &

R., 267. Where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a three-penny receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A'Court v. Cross*, 3 *Bing.*, 329. The following letter from the defendant to the plaintiff's attorney was held not sufficient. "Since the receipt of your letter (and indeed for some time previously) I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 3 *M. & W.*, 402. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt. *Spong v. Wright*, 9 *M. & W.*, 629. *Roscoe*, 6th edit., pp. 319, 20.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed, of which B was trustee, to whom he had handed the account, and that B had authorized him to refer the creditor to him; this was held not sufficient to take the case out of the statute; the debtor not charging himself by the acknowledgment. *Whippy v. Hilary*, 3 *B. & Ad.*, 399. So, where a debtor, having sums due to him, handed the accounts to his creditor, wrote, "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear," and added his signature, it was held that this acknowledgment did not imply a promise to pay, and was no answer to the statute. *Routledge v. Ramsay*, 8 *A. & E.*, 221.

A deed of composition, by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and pay all such creditors as should sign the schedule of debts annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise, nor an acknowledgment in writing under the statute, for the acknowledgment was only of some debt, but what remained to be made out by parol evidence. *Kennett v. Milbank*, 8 *Bing.*, 38.

Acknowledgment insufficient accompanied with refusal, or denial of liability.—Although there be the most distinct admission of the debt, yet if it be accompanied by a refusal to pay, the statute is not obviated, for such refusal prevents the implication of a promise arising from the acknowledgment. By Lord Tenterton, C. J., *Tanner v. Smart*, 6 *B. &*

C., 610; see also *A'Court v. Cross*, 3 *Bing.*, 328. Where the defendant acknowledges the debt, but insists at the same time that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt and will send you a copy of the receipt," but such a copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 *Esp.*, 184; anon. cited *Holt*, *N. P.*, 381. Where the acknowledgment was, "You owe me more money; I have a set-off against it," it was held (Best, J., *dis.*) not to take the case out of the statute. *Swann v. Sowell*, 2 *B. & Ald.*, 759. So where on application for the amount of a bill the defendant said, "that there had been such a bill, but that the plaintiff and his deceased partner had received the money, and that there was a balance due to him (the defendant) from the executors of the deceased," the acknowledgment was held not to be sufficient, and it was doubted whether the plaintiff could go into evidence of the account between the deceased partner and the defendant, to falsify what the latter said. *Beale v. Nind*, 4 *B. & Ald.*, 568.

Upon the same principle, where the defendant acknowledges a debt, but insists at the same time that the statute bars it, such an acknowledgment would appear to be insufficient, although formerly held to be sufficient; *vide Roscoe*, 6th edit., p. 320. In *Linley v. Bonsor* (2 *Bing.*, *N. C.*, 241,) the defendant accompanied his acknowledgment of the debt with an assertion that he should have nothing to do with the claim; that he wished the plaintiff would make him a bankrupt, and that he would rather go to gaol than pay the plaintiff; and it was held to have been properly left to a jury to consider whether the acknowledgment was one from which a promise to pay could be inferred.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 *Esp.*, 66; *Hellings v. Shaw*, 1 *B. Moore*, 344; 7 *Taunt.*, 608, *S. C.* But the doctrine is adverted to by the court with some expression of doubt in *Beale v. Nind*, *supra*. *Roscoe*, 6th edit., p. 321.

Acknowledgment does not require a stamp.—The 9th Geo. IV., c. 14, s. 8, exempts from stamp duty memoranda made for the purpose of taking cases out of the Statute of Limitations. To fall within this exemption, however, the memorandum must be produced merely to defeat the opera-

tion of the statute, the plaintiff proving the debt by other evidence. *Morris v. Dixon*, 4 A. & E., 846. A memorandum in the form of a promissory note offered in evidence for that purpose is inadmissible unless stamped; the exemption is only of such instruments as would, but for such exemption, have to be stamped as agreements. *Jones v. Ryder*, 4 M. and W., 32.

The following memorandum, "I acknowledge to owe M. 36L, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by the statute in question provided it be put in for the mere purpose of barring the statute of limitations. *Morris v. Dixon*, *supra*.

By whom the acknowledgment must be made.—The enactment of the first section of the statute 9th Geo. IV., c. 14, is, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, "unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby." In consequence of these last words, it has been decided that an acknowledgment, signed by an agent on behalf of the debtor, is not sufficient. *Hyde v. Johnson*, 2 Bing., N.C., 777. It does not appear however from that case, that the agent, who was the party's own wife, was authorized in writing, so that, perhaps, some doubt may still exist whether, if a case were to occur, in which an agent authorized by writing were to sign a written acknowledgment, this would not be looked upon as sufficiently connected with the document signed by the principal to satisfy the words of the statute. It must, however, be observed, that the expressions used by the Chief Justice, in *Hyde v. Johnson*, are extremely comprehensive, and seem to militate against such a distinction. *Smith's Leading Cases*, 2nd edit., vol. i, p. 822.

The statute 9th Geo. IV., c. 14, s. 1, also enacts that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments (i. e., statutes of limitation) or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made, or signed by any other or others of them; provided always that nothing herein contained shall alter or take away, or lessen the effect of, any payment of any principal or interest made by any person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall

appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors, or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Since this enactment, one joint-contractor cannot prevent the other from taking advantage of the Statute of Limitations by any species of acknowledgment excepting in part payment of principal or interest. *Smith's Leading Cases*, 2nd edit., vol. i. p. 321. The 9th Geo. IV. having distinguished between the effect of a promise by one of many joint contractors, and the payment of interest by such a person, the law in respect of such a payment remains where it was under the previous decisions. *Per Park, J. Wyatt v. Hodson*, 8 Bing., 313. The reason which induced the legislature to make this distinction in favour of payment is said by Tindal, C. J., to have been because the payment of principal or interest stands "on a different footing from the making of promises, which are often rash and ill-interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." *Wyatt v. Hodson*, 8 Bing., 313; *vide also Smith's Leading Cases ut supra*.

It appears to be undecided whether a written acknowledgment, made and signed by one of several partners, stands upon a different footing from a written acknowledgment, made and signed by one of several joint contractors, the case provided for by the act. *See Clark v. Alexander*, 13 L. J. C. P., 136.

To whom the acknowledgment may be made.—An acknowledgment made to a stranger that the debt is owing to the plaintiff, is sufficient. *Peters v. Brown*, 4 Esp., 46. So an acknowledgment within six years, in a deed between the defendants and third persons, of the existence of a debt due to the plaintiffs, who are strangers to the deed. *Mountstephen v. Brooke*, 3 B. & A., 141; and *see Clark v. Hougham*, 2 B. & C., 149; *Halliday v. Ward*, 3 Camp., 32.

Proof of written acknowledgment.—In general the acknowledgment must be produced and proved as other written instruments, *ante p.* 14. Where a written promise to pay a debt barred by the statute of limitations has been lost,

parol evidence of the contents of the writing is admissible. *Haydon v. Williams*, 7 Bing., 163; 4 M. & P., 811. But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence. *Edmunds v. Downes*, 2 C. & M., 459; 4 Tyr., 173, S. C.

Acknowledgment by part payment.—Part payment of the debt is an acknowledgment of its existence, and has always been held to take a case out of the statute; and as Lord Tenterden's Act provides that nothing therein contained shall alter or take away, or lessen the effect of, any payment of principal or interest made by any person whatever, the cases relating to part payment are still to be considered authority. *Roscoe*, 6th edit., p. 316.

That part payment may have the effect of taking a case out of the Statute of Limitations, it must be observed that there are two requisites besides proof of the naked fact of payment: 1st., it must appear that the payment was made on account of a larger debt; 2nd., that that debt is the one sued for. *Tippetts v. Heane*, 4 Tyrwh., 775. See the judgment of Parke, B. there, and see *Holme v. Green*, 1 Stack., 448; *Smith's Leading Cases*, 2nd edit., vol. i., p. 321.

Payment must be on account of a larger debt.—The meaning of *part payment* of the principal is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it; and the reason why the effect of such a payment is not lessened by the act 9th Geo. IV., c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact. *Waters v. Tompkins*, 2 C. M. & R., 726. But where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the statute. *Burn v. Boulton*, 2 M. G. & S., 485; 15 L. J. C. P., 97, S. C.

Where a payment of part of the demand is made as and for a payment of the whole that is considered by the defendant to be due, such payment will not take the rest out of the statute. *Semb. Waugh v. Cope*, 6 M. & W., 824. Where the defendant authorized an agent to offer the plaintiff a part of his debt in discharge of the *whole*, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in *part* discharge, it was held that this was not a part payment to take the debt out of the statute. *Linsell v. Bonsor*, 2 Bing., N. C., 241.

Payment must be on account of the debt sued for.—It

appears that where there are two clear and undisputed debts, the case is not taken out of the statute of limitations as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or to the other. *Vide per Tindal, C. J., Burn v. Boulton*, 2 M. G. & S., 485. In *Mills v. Fowkes*, 5 Bing., N. C., 455, it was held, that though a creditor has a right to appropriate a payment made generally, to an item barred by the Statute of Limitations, still such payment is not a payment on account so as to take the remainder of the demand out of the statute.

A payment made to the creditor to the use of his debtor, by a third party, cannot be appropriated by the creditor so as to bar the statute. *Waller v. Lacy*, 1 M. & G., 54. The payment need not necessarily have been in money. It has been held that if goods be given and accepted in part payment within six years, that takes the case out of the statute. *Hooper v. Stephens*, 4 A. & E., 71; *Hart v. Nash*, 2 C. M. & R., 387.

When a bill is given on account of part of a debt, and is paid by the drawee, the statute is not avoided by such payment, though it may be by the delivery of the bill. *Irving v. Veitch*, 3 M. & W., 90.

Proof of part payment.—There ought to be proof of actual payment by an eye-witness of the fact, or by the production of documents which of themselves import payment. No mere admission of payment is sufficient to take the case out of the statute, unless it be in writing, signed by the party chargeable; *Bagley v. Ashton*, 12 A. & E., 493; 9 L. J. Q. B., 376. *Willis v. Newham*, 3 Y. & J., 518; and therefore a mere parol statement of an antecedent debt, without any new contract or consideration made within six years, does not constitute a sufficient cause of action to prevent the operation of the statute. *Jones v. Ryder*, 4 M. & W., 32.

Where there are items of account on both sides, an oral statement of an account within six years, and a promise to pay the balance, has been held to take the case out of the statute. *Ashby v. James*, 11 M. & W., 542. This decision has been questioned, but may be supported on the ground that the going through the account with items on both sides, and striking a balance, converts the set-off into payments; and the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set-off against the earlier items of the plaintiff's, leaving the case unaffected either by the statute of limitations or the set-off. *By Alderson, B., Hopkins v.*

Logan, 5 M. & W., 542; and see the Judgment in *Clark v. Alexander*, 13 L. J., C. P., 133.

A witness who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant was in his own handwriting but said he could not recollect the fact of payment; it was held nevertheless, that there was sufficient evidence to go to a jury, as to the fact of payment, to take the case out of the statute. *Trentham v. Deverill*, 3 Bing., N. C., 397; 4 Scott, 128, S. C.

It is quite clear, however, if the payment be proved as a fact, the appropriation of that payment to the debt which it is sought to take out of the Statute of Limitations, may be proved by an admission. *Waters v. Tomkins*, 2 C. M. & R., 726. (See this case post, 'Action for money lent.') *Vide Smith's Leading Cases*, 2nd edit., vol. i, p. 320-1.

A verbal acknowledgment by the debtor, within six years of the part payment of a debt, is not sufficient to take the case out of the statute. *Maghee v. O'Neil*, 7 M. & W., 531.

Disability to sue.—Besides the fact of an acknowledgment or part payment, the plaintiff may get rid of the effect of the statute by shewing his disability to sue.

The statute 21 James I., c. 16, s. 7, enacts that if the person or persons entitled to bring the action, shall, at the time the right to bring it, accrued to him, be within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, then such person or persons shall be at liberty to bring the same action within the limited time, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

The statute 3 & 4 Will. IV., c. 42, s. 7, provides "that no part of the United Kingdom of Great Britain and Ireland, or the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any island adjacent to any of them, being part of the dominions of His Majesty, shall be deemed to be beyond the seas within the meaning of this Act or of the Statute of 21 Jac. I."

By the statute 4 Anne, c. 16, s. 19, persons entitled to the causes of actions by the statute of James, shall be at liberty, if the *person against whom* the cause of suit existed, were, at the time such cause of action or suit arose or accrued, beyond the seas, to bring the action against such person after his return from beyond the seas; "so as they

take the same after his return from beyond the seas within the time limited by the statute of James."

Ireland is not beyond the seas under the statute of Anne; the 3 & 4 W. M. only extending to the statute of James. *Lane v. Bennett*, 1 M. & W., 70.

The avoidance of the Statute of Limitations on account of the disabilities mentioned, is not likely to be of frequent occurrence in actions in the County Courts. It is therefore only necessary to observe here, that when the Statute of Limitations once begins to run, it will not be avoided by the subsequent absence, &c., of the parties. *Cotterell v. Dutton*, 4 Taunt., 826.

RELEASE.

The release of a debt without payment, may occur either by the express act of the creditor, or by operation of law. The former mode of release is to be noticed here—release by operation of law is treated of under the head of defences by taking higher security. *See post* 94.

The general rule is, that a release should be under seal; for a verbal or written statement by a plaintiff that he excused or discharged the defendant, would not bind him, but the same words *under seal* would have that effect. If under seal no consideration is necessary; but if the discharge be not under seal it is inoperative for want of consideration, although the debtor pay part of the debt, and the creditor give a receipt expressing that such money is received in full of all demands.

No particular form of words is necessary to constitute a valid release. Any words which evince an evident intention to renounce the claim on, or to discharge the debtor, are sufficient. An acknowledgment that the party "is satisfied," &c., amounts to a release; and a covenant never to sue, executed by a sole creditor to and in favour of a sole debtor, has been held to amount to a release, in order to avoid a circuity of action, *i. e.*, the absurdity of allowing A to recover against B in one action, the identical sum which B has a right to recover in another action against A.

Where there is an existing debt, a release of "all actions or demands" discharges it, although the money be not payable until a future day; but a party cannot release all causes of action that may arise or accrue after the execution of a release. *See per Best, C. J., Radburn v. Morris*, 4 Bing., 649; *per Denman, C. J., Wilson v. Hirst*, 4 B. & Adol. 767.

The effect of a release cannot be avoided by parol evi-

dence; but it shall be construed according to the particular purpose and intent for which it was made. A general release may be restrained in its operation by a recital therein. A deed containing a general release of all debts, &c., recited that the release had previously agreed to pay to the releasor the sum of 40*l.* for the possession of certain premises, and that "in consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a-piece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, did release, &c., there was also a receipt for the sum of 40*l.* indorsed on the release, but it appeared, on action afterwards brought for this sum, that, in fact, it had never been paid, it was held that the deed of release was no *estoppel*, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* *Lampon v. Corke*, 5 B & Ald., 806; *Chitty on Contracts*, 3rd edit., p. 778.

A release may extend to *part* only of a debt or claim. *Roll. Abr.*, tit. *Release*.

Composition with creditors.—The defence of release frequently arises in cases where the defendant has made an assignment for the benefit of his auditors who sign a release on certain conditions.

It has been stated, *ante*, p. 90, as a general rule, that a release must be under seal; but a composition with several creditors is an exception; for if a creditor, under a composition arrangement with other creditors and the debtor, accept or agree to accept part of his demand as a composition, or in full of his demand, the claim to the remainder is in law extinguished, although there be not any release by deed, because it would be a fraud on the other creditors to seek to enforce the payment of the balance; and it is equally a fraud, although such a creditor was the last who agreed to the terms, and did not induce any of the other claimants to accede thereto.

A creditor who executes a composition deed or agreement is bound by the terms of it to the extent of his then existing debt, although he do not set the amount of his claim opposite to his signature to the deed, and the instrument purport to be made between the debtor and his trustees, "and the creditors whose names are subscribed and debts set against their names." *Harry v. Wall*, 1 B. & Ald., 103.

A composition deed is not void, although one of two trustees appointed, refuse to execute it, and there be a

proviso that both should execute by a specified time *Small v. Marwood*, 9 B. & C., 300; and if there be a proviso in a composition deed that it shall be void if any creditor refuse to execute the same, it is incumbent on a creditor seeking after his execution of the deed, to avoid it, to prove a positive refusal of some particular creditor to concur in the arrangement, and mere evidence of his non-execution of the instrument insufficient. *Holmes v. Love*, 3 B. & C., 242. An agreement for a composition arrangement binds the creditors, though not carried into effect; it not appearing that there has been any unwillingness or refusal on the part of the debtor to perform the contract, *Good v. Cheesman*, 2 B. & Ad., 328; but an agreement to sign a composition deed, &c., will not bar an action for the full debt, if the creditor be prevented by the debtor or his trustees from signing. *Garrard v. Woolner*, 8 Bing., 258. By an agreement between the defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business and paid the creditors 10s. in the pound; they then tendered for execution by defendants, a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance. The instrument not having been executed by all the creditors, a meeting, at which the defendants were called on to execute, was adjourned, that the signature of every creditor might be obtained. It was held that the plaintiffs, who as creditors were parties to the above agreement, could not sue for their original debt, at least until the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. *Tatlock v. Smith*, 6 Bing., 339; *Chitty on Contracts*, 3rd edit., p. 775. An agreement with one creditor for a composition entered into, on the faith that the *general body* of the creditors would join, is not binding, unless it appear that the rest of the creditors were applied to, and have concurred in accepting the composition. *Reay v. Richardson*, 2 C. M. & R., 422.

A private agreement between the debtor and one of the creditors, who concurs or joins in the general arrangement, that the debtor, or a third party for him, shall pay a further sum of money, or give a better or further security than such as is provided for the other creditors, is void, as a fraud on them, *Alsager v. Spalding*, 4 Bing., N. C., 407;

and the receiving an additional advantage (as goods for part of the debt), unknown to the creditors, even from a third person, is a fraud on the creditors, which precludes the creditor from afterwards recovering the composition, although the third person volunteered to afford the plaintiff the additional benefit. *Knight v. Hunt*, 5 Bing., 432.

If it appear that there has been a wilful withholding by the debtor, of information respecting his estate, it will avoid the composition, and remit the creditor to his right to sue for the whole. *Vine v. Mitchell*, 1 M. & Rob., 337; *Chitty on Contracts*, 3rd edit., p. 686.

By, and to whom granted.]—A discharge of one joint and several debtor is a discharge of all, *Nicholson v. Revill*, 7 A. & E., 675; but though a release of the whole debt, given to one of two joint contractors, enures to the benefit of both, yet receiving a portion of a debt, and putting an end to an action against one of the contractors, is not a release of the other. *Watters v. Smith*, 2 B. & Ad., 889.

So, a release of a debt by one of several joint creditors is, in law, a discharge of the debt. Where, in an action in the names of A and B to recover a debt which had accrued due to them as partners, it appeared that their partnership had been dissolved, upon the terms that A should collect the debts due to, and satisfy the claims upon the firm, and B had no beneficial interest, of which the defendant was aware; a release by B to the defendant was, on motion, set aside as fraudulent, and ordered to be cancelled. *Barker v. Richardson*, 1 Y. & J., 362. And it is a general rule in the superior courts, that if a trustee or nominal plaintiff, fraudulently release the action, to the prejudice and without the consent of the party beneficially interested, the court will, on motion, interfere to prevent the defendant availing himself of it; but it seems that if the party opposing the release do not apply to set it aside, the judge at the trial must give it effect, and can only regard the legal rights of the parties.

A release to one of several joint contractors operates as a discharge, although it were given on a parol undertaking by the party not expressly released, that he should remain liable, for the debt is thereby in law satisfied, *Cocks v. Nash*, 9 Bing., 341; and though an absolute covenant never to sue may operate as a release when entered into by a sole creditor in favor of a sole debtor, it has not that effect when made by one of two joint creditors, or by a sole creditor to one of two joint debtors, *Walmesley v. Cooper*, 11 A. & E., 216; and the legal operation of a release to one of several joint contractors may be restrained in some cases,

by the express terms of the instrument, as where a release was given to one of two partners, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other partner, and that he might, notwithstanding the release sue them jointly. In that case the plaintiff may sue both to recover against one. *Solly v. Forbes*, 2 B. & B., 38; *Chitty on Contracts*, 3rd edit., p. 781.

Proof of release.—The defendant should produce the deed of release and proof of its execution, and it is no excuse for not producing it to shew that there was but one part of the indenture, which part did not belong to the defendant, who had no right to, or custody of, or any control over it, and that it was in the possession of trustees who refused the possession of it to the defendant, *Hodgson v. Warden*, 13 L. J. Ex., 257; if, however, the deed is in the possession of the plaintiff, the defendant may give secondary evidence of the contents, after giving notice to the plaintiff to produce it.

HIGHER SECURITY GIVEN FOR THE DEBT.

In general, a simple contract debt is extinguished if a *specialty* security is given for it. Thus, a simple contract debt is merged in a bond or covenant taken for or to secure the claim, because in legal contemplation the specialty is an instrument of a higher nature, and affords a higher security and a better remedy, than the original demand presented. But this does not hold, if it appear on the face of the instrument that it was intended only as an additional or collateral security, and there is nothing in it expressly inconsistent with such intention. *Chitty on Contracts*, 3rd edit., p. 783.

This defence is not likely to arise frequently in actions in the County Courts, as a special security is not likely to be substituted for a simple contract claim of so small an amount as 20*l.*

For the defence, that a bill of exchange or promissory note was given for the amount, *see ante*, p. 54.

JUDGMENT RECOVERED.

If the plaintiff has already brought an action and obtained a judgment for the same demand, this will be a good defence, on the ground that the contract or obligation in respect of which such demand accrued, is merged by the superiority of the security acquired by the judgment. The

defence, therefore, that the plaintiff has recovered a judgment, resembles that already mentioned, namely, that the plaintiff holds a higher security for his debt.

If a plaintiff having several causes of action against a defendant, on the trial offer evidence on those causes, and fail for want of sufficient evidence to establish some of them, he cannot bring another suit for those causes of action on which he failed; and if the declaration, if the first action were brought in the superior courts, or the plaint or particulars of demand, if brought in the County Court, is framed so as to admit of evidence of debts then existing, and which are sought to be recovered in the second suit, and the defendant suffered judgment by default in the first action, it will be presumed against the plaintiff that he therein recovered such debts, *Bagot v. Williams*, 3 B. & C., 235. If however he can show, that having several claims, he gave no evidence whatever in the former action upon the causes of action which form the subject of the second suit, the judgment which he before obtained will not bar such second action, *Seddon v. Tutop*, 6 T. R., 607; and where the plaintiff recovered only *nominal* damages in the first suit, by reason of a technical objection precluding inquiry as to the amount due, a second action is not barred. *Chitty on Contracts*, 3rd edit., p. 788.

A judgment recovered against one of two or more *joint* contractors, is of itself, without execution, a bar to an action for the same debt against another joint contractor. *King v. Hoare*, 14 L. J. Ex., 29.

If the plaintiff has before sued the defendant upon the same supposed causes of action, and in such former suit a verdict passed *for the defendant*, the latter cannot be sued in a second action for the same matter. In such case, the former verdict in the defendant's favour, upon the merits of the same question, operates against the plaintiff as an *estoppel*, if so pleaded. Where, however, the defendant has *non-prossed* the plaintiff in the first action, he cannot set up such *non-pros* in answer to the second action. *Chitty on Contracts*, 3rd edit., p. 789.

It seems doubtful whether the mere admission of the plaintiff at the trial, that he has recovered a judgment in another court for the same debt, is sufficient evidence of the fact. See judgment of Williams, J. in *ex parte Rayner*, 17 L. J., C. P., 16.

ANOTHER ACTION PENDING.

That another action is pending against the defendant for the same subject-matter, is a good defence, for in such case

the right of action in a second suit for the same cause is suspended or abated. The suits must, however, be substantially the same, brought by the same parties, and founded on the same cause of action. *Chitty on Contracts*, 3rd edit., p. 786; and it is no defence that another action is pending for the same cause against a third party. *Henry v. Goldney*, 15 L. J. Ex., 298*.

BANKRUPTCY OF THE DEFENDANT.

The certificate of a bankrupt confirmed by the Court of Review, discharges him, but not his partner or a joint contractor, from all debts and demands which the creditor has proved, or might have proved, under the commission, but he is clearly responsible upon any agreement which he makes *after* his bankruptcy.

A creditor may prove not only a debt which accrued due to him before the act of bankruptcy, but also a debt or demand really and *bonâ fide* contracted after the act of bankruptcy, and before the fiat was issued, if the creditor had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed. 6 Geo. IV., c. 16, s. 47; 2 & 3 Vict., c. 29. *Chitty on Contracts*, 3rd edit., p. 185.

The 5th & 6th Vict., c. 122, for the amendment of the law of bankruptcy, sec. 39, enacts that no certificate shall be a discharge unless the court authorized to act in the prosecution of a fiat shall in writing, under and seal, certify to the Court of Review the bankrupt's compliance with the law, &c., and unless the allowance of such certificate shall be confirmed by the Court of Review; and sec. 42 enacts, that any bankrupt who after such certificate shall have been confirmed, have any action brought against him for any debt, claim, or demand, proveable under the fiat against such bankrupt, may plead in general that the cause of action accrued before he became bankrupt, and may give that act and the special matter in evidence; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading, bankruptcy, fiat, and other proceedings precedent to the obtaining such certificate. To support this defence, therefore, the defendant has only to produce his certificate, duly allowed and confirmed.

A certificate of conformity under a fiat must appear to

* Mr. Amos appears to have entertained a case in the County Court, notwithstanding the pendency of an action in the superior courts for the same subject-matter. See *Keogh v. Burke*, *County Courts Chronicle*, p. 87. It is difficult to see upon what ground such a course can be supported.

have been entered of record in the Court of Bankruptcy. The 2 & 3 Will. IV., c. 114, sec. 9, enacts that upon the production, in evidence, of any fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been entered of record, without any further proof thereof. The jurisdiction and powers of the Court of Review are by the 10 & 11 Vict., c. 102, vested in one of the Vice Chancellors.

A certificate under a joint fiat may be given in evidence in an action for a separate debt, and *vice versa*. *Horsey's case*, 3 P. Wms., 23; *ex parte Yale*, *id.* 24 (n.).

If a fiat issue against a person by a wrong name, and he obtains his certificate under it, and an action is afterwards brought against him in his right name, he may shew that he is the person against whom the fiat issued, and that he has gone by the name by which he is described in the fiat. *Stevens v. Elizee*, 3 Camp., 256.

Five days' notice of this defence must be given by the defendant to the clerk of the County Court. 9 & 10 Vict., c. 95, s. 76. *Rule of Practice*, 19.

Where one of several persons, who were joint debtors, is discharged from liability by his bankruptcy and certificate, or under an insolvent act, the creditor need not sue him with the other parties. 3 & 4 W. IV., c. 42, s. 9. Independently of this enactment, the County Courts Act allows one joint contractor to be sued alone.

Evidence for the plaintiff in reply—subsequent promise.—A bankrupt is under a moral obligation to pay his debts, although the legal remedy of the creditors be barred by his certificate. Consequently, the law will give effect to an express and distinct promise made by a bankrupt without any new consideration, either after the issuing of the fiat, and before his certificate has been granted, or after the certificate has been obtained, to pay a debt barred by his certificate, although the debt were proveable under the fiat. *Chitty on Contracts*, 3rd edit., p. 191.

By 5 & 6 Vict., c. 122, s. 43 (repeating s. 131 of 6 Geo., IV., c. 16), no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or

agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.

The promise must be a legal promise in writing, distinctly and unequivocally expressed, binding, not his estate, but the bankrupt *personally* to pay: a mere written acknowledgment of a debt, though implying a promise to pay, would amount only to an account stated, and the promise would be barred by the certificate. Where a bankrupt after the fiat and three days before the certificate gave to a creditor a memorandum, whereby, in consideration of services before bankruptcy, he promised to pay him his debt by instalments at future dates, it was held, in the absence of fraud, that this was a valid promise, notwithstanding the certificate. *Kirkpatrick v. Tattersall*, 14 L. J. Ex., 209.

The initial of the defendant's surname is not a sufficient signature within this clause. *Hubert v. Moreau*, 2 C. & P. 528; 12 Moore, 216, S. C.; but the following note was held sufficient. "Mr. Stanley begs to inform Messrs. Lobb & Co., that he will take an early opportunity of settling their account; but Mr. Stanley objects to give his bill. Mr. Stanley regrets that he has been prevented from answering Messrs. Lobb & Co's. letter before. Crescent, Saturday," notice being given to produce the plaintiff's letter. The christian name is not essential, and the surname as much authenticates the instrument if it is written "Mr. S. does or promises so and so," as if it had been written, "I Mr. S. promise." *Lobb v. Stanley*, 13 L. J., Q. B., 117.

The decisions on the 17th section of the Statute of Frauds (*see post, goods bargained and sold*), and on the 9 Geo. IV., c. 14, s. 1, with respect to the Statute of Limitations (*ante* p. 77), apply to this point.

If a bankrupt make only a conditional promise, as "to pay when he is able," it seems that the plaintiff must prove the defendant's ability. *Brix v. Braham*, 8 Moore, 264.

That the defendant had before been a bankrupt, and had not paid his creditors under the second fiat 15s. in the pound, under the 6 Geo. IV., c. 16, s. 127, does not render the defendant liable for a debt due before the fiat. That section declares, that under those circumstances the certificate shall only protect the person of the bankrupt, but his future estate shall vest in the assignees, and it would be extraordinary were the bankrupt's person protected, and the property vested in the assignees, and yet the action be maintainable. *Eiche v. Nokes, M. & Mal.*, 303.

INSOLVENCY OF DEFENDANT.

The Insolvent Debtor's Act 1 & 2 Vict., c. 110, enacts, sec. 75, that at the final hearing, upon the prisoner swearing to the truth of his schedule, and executing the prescribed warrant of attorney, the court may adjudge that the prisoner shall be discharged from custody, and entitled to the benefit of the Act, at a named time, as to the debts due or claimed to be due, when such vesting order was made from the prisoner to the creditors named in the schedule, or claiming to be creditors, or for which they shall have given credit to the prisoner before the petition, and which were not then payable; and as to the claims of all other persons not known to such prisoner at the time of adjudication, who may be holders of negotiable securities mentioned in the schedule. The order of adjudication need not specify the debts or name the creditors, s. 83.

By sec. 91, it is enacted, that if after any person shall have become entitled to the benefit of that Act, any suit or action, &c., shall be brought against such person, for any debt or sum of money in respect of which he is discharged, or upon any new contract or security for payment thereof, such person may plead generally that he was duly discharged, according to the Act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially, whereto the plaintiff may reply generally, and deny the matters pleaded, or reply any other matter which may show the defendant not to be entitled to the benefit of the Act, or that such person was not duly discharged, in the same manner as the plaintiff might have replied in case the defendant had pleaded the Act, and a discharge by virtue thereof, specially.

Although the rules as to the pleadings do not apply to actions in the County Courts, the course of proceeding and the nature of the evidence upon the trial will be nearly the same.

The 78th section of the same Act provides, that in case it shall appear that the prisoner has contracted any debt fraudulently, or by means of a breach of trust, or false pretences, or without having had any reasonable or probable expectation of paying the same, or shall have fraudulently, or by false pretences, obtained the forbearance of any of his debts by any of his creditors, or shall have put any of his creditors to any unnecessary expense by any vexatious or frivolous defence, or delay, to any suit for recovering any debt or sum of money due from such prisoner

ner, or shall be indebted for damages in certain actions, the Court may defer the discharge as to such debts, &c., until the prisoner shall have been in custody at the suit of the creditor for the same respectively, for such period as the Court shall direct, not exceeding two years in the whole.

Unlike the case of a *bankrupt*, the subsequent promise of an insolvent debtor to pay a debt from which he has been discharged under the 1 & 2 Vict., c. 110, cannot be enforced; sec. 91 expressly extends the effect of a discharge to any *new* contract or security for debts; *ante* p. 99.

The 5 and 6 Vict., c. 116, which gives power to any person not being a trader, or being a trader owing less than 300*l.*, to petition the Court of Bankruptcy in London, or a district commissioner, for protection from process, provides (sec. 10) that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence.

By the 7 & 8 Vict., c. 96, s. 37, proof of the handwriting appears to be unnecessary, and by the 10 & 11 Vict., c. 102, the jurisdiction of the Courts of Bankruptcy under the statutes 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, are transferred to the Insolvent Court and to the County Courts.

The 7 and 8 Vict., c. 96, amending the 5 & 6 Vict., c. 116, enacts (sec. 22) that the final order to be made under the provisions of the 5 and 6 Vict., c. 116, as amended by the other statute, shall protect the person of the petitioner from being taken or detained under any process whatever in the cases thereafter mentioned; "that is to say, from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsers or holders of any negotiable securities set forth in such schedule: Provided always, that every such final order may be made without specifying therein any such debt or debts, or sum or sums of money, or claims as

aforesaid, or naming therein any such creditor or creditors as aforesaid."

It has been decided that an order for protection under this statute protects the *person* only from process, and not after-acquired property, not attached by the assignees; *Toomer v. Gingell*, 15 *L. J. C. P.*, 255. The order therefore under this statute cannot be set up as a defence to an action against the insolvent*.

As regards the evidence of a discharge under the Act 1 and 2 Vict., c. 110, a copy of the petition, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c., and sealed with the seal of the court, is evidence of such petition, &c., without other proof than that the same is sealed with such seal (sec. 105). The usual mode therefore of establishing that the defendant has been discharged under that Act, as to the plaintiff's demand, is to produce a copy of the petition and schedule of the insolvent, and also the order of adjudication for his discharge under the seal of the court. The schedule is proved to show that the plaintiff and the debt he claims are mentioned therein. It is not necessary to prove the notice, or the affidavit of the notice, to the creditor, &c., of the petition and time of hearing; *Pascal v. Brown*, 3 *Stark.*, R., 54. And it is no answer for the plaintiff to say that he had no notice of the making the order and filing the schedule. *Reid v. Crofts*, 5 *Bing.*, N. O., 68.

It seems that the discharge cannot be proved by parol evidence; not even by proof of the acknowledgment of the party, for the discharge may have been irregular and void, or may have been mistaken by the insolvent. *Scott v. Clare*, 3 *Camp.*, 236. *Chitty on Contracts*, 3rd edit., p. 862.

It is not necessary that the sum inserted in the schedule should correspond precisely with the amount sued for if in fact the claims are identical, but when there is a difference evidence should be given by the defendant to explain it, otherwise the plaintiff will fail because the debts will not appear to be identical, nor will the schedule appear to give a true description of the debt as required by 1 and 2 Vict., c. 110, s. 69; *Maile v. Bays*, 14 *L. J. Q. B.*, 231. Such

* A difference of opinion appears to exist among the Judges of the County Courts as to whether the above clause in the 7 and 8 Vict. repeals the 10th section of the 5 and 6 Vict., c. 116; See *County Courts Chronicle*, pp. 80, 187.

INSOLVENCY OF THE PLAINTIFF.

The Insolvent Act, 1 and 2 Vict., c. 110, s. 37, enacts that upon the filing of the insolvent's petition, the court shall order that all the estate and effects, and all debts due or growing due to the prisoner, or to be due to him or her before his discharge, shall be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, and such order shall be entered of record in the court and such notice thereof shall be published as the said court shall direct, and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all the future real and personal estate and effects as aforesaid of every nature and kind whatsoever, and all such debts as aforesaid in the said provisional assignee; and by section 65 upon the appointment of an assignee by the court, the property is vested in him in the place of the provisional assignee, for the benefit of the creditors.

If at the time of the commencement of the action the property of the plaintiff was vested in the provisional assignee, under the above section, it is no answer to this defence to show that since the commencement of the action the plaintiff's petition was dismissed by the Insolvent Court, and that he was discharged without taking the benefit of the Act; for the subsequent dismissal cannot give a right to sue where none existed at the time the action was commenced. *Yorston v. Feather*, 15 L. J. Es., 31.

The petition and order appear to bar absolutely any action by the insolvent to recover his former debts or property although the assignee does not interfere. See *Lee v. Telfer*, 1 C. & P., 146. But an action may be maintained in his name by a person to whom he has assigned a debt due to him before his insolvency, and of which assignment notice has been given to the debtor. *Buck v. Lee*, 1 A. & E., 804, *ante*, p. 103.

It seems that the case of an insolvent is analogous to that of a bankrupt in regard to the rights of action of the former upon contracts made after the petition and assignment, and in respect to after-acquired property; *Lee v. Telfer*, *supra*. There is some reason to consider that, as regards agreements made after the petition and hearing, and before the final discharge, the insolvent may have a right of action upon agreements made by him during that period (should the assignees not interfere and claim the benefit,) although the assignment under the Act expressly vests in them the debts which may be due or grow due to him at any time before

his final discharge. It has been held that an insolvent may sue on a contract of sale made by him subsequently to the hearing of his petition, and while he was detained in prison by the order of the court. It was contended that the plaintiff could not sue in respect of a contract made during the time for which he was remanded by the Insolvent Debtors Court; that this was not a demand for the labour or personal earnings of the plaintiff, but for goods sold and delivered; and that at the time of the alleged sale, the plaintiff's liberation had not taken place, and all his property belonged to the assignees under the Insolvent Debtors' Act. The court, however, referred to the case of *Kitchin v. Bartsch*, 7 East, ante p. 103, and said "that in the absence of any intervention by the assignees, it did not seem to lie in the mouth of the defendant to resist the claim on the ground of the incompetency of the plaintiff to contract." *Taylor v. Buchanan*, 4 B. & C., 420. This was a decision upon the 1 Geo. IV., c. 119, which contains no clause similar to that in the 1 and 2 Vict., c. 110, in regard to property and debts accruing to the insolvent during his imprisonment, see *Pepper v. Marshall*, 2 Bing., 372; but if there be any analogy between a bankrupt and an insolvent in this respect, the latter may sue (unless the assignee interpose) in the same manner and upon the same principle that a bankrupt may sue on contracts made after the fiat and before he obtains his certificate; although the assignees are also entitled to sue if they please to interfere: *Chitty on Contracts*, 3rd edit., p. 206; see ante p. 103.

The 5 and 6 Vict., c. 116, (amended by 7 and 8 Vict., c. 96), which gives power to any person not being a trader, or being a trader owing less than 300*l.*, to petition the Court of Bankruptcy in London, or a district commissioner, for protection from process, enacts (section 1) that upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts. Upon the appointment of the creditor's assignee, the property, &c., of the insolvent is vested in both assignees jointly (sec. 7). After the appointment of the official assignee, the insolvent cannot maintain an action: *Sayer v. Dufaur*, 17 L. J., Q. B., 50.

As to the evidence of the plaintiff's insolvency, see ante, p. 101, and post, *Actions by Assignees*.

A verbal acknowledgment by the plaintiff of his discharge,

under the Act, is not enough; *Scott v. Clare*, 3 Camp., 236. The order for the appointment of an assignee, reciting the date of the vesting order, is not evidence of such date; but this must be proved by a certified copy of the vesting order, or of the adjudication of discharge which shews it. *Yorke v. Brown*, 10 M. & W., 78.

PAYMENT INTO COURT.

The County Courts Act empowers the defendant in any action brought under that Act, to pay into court within such time as should be directed by the rules made for regulating the practice of the court, such sum of money as he shall think a full satisfaction for the demand of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment. 9 & 10 Vict., c. 95, s. 82.

This defence differs from all those already considered, inasmuch as it admits a legal claim by the plaintiff against the defendant existing at the time of the entering of the plaint to the amount so paid into court; *Blackburn v. Scholes*, 2 Camp., 341. It is generally adopted where the plaintiff seeks to recover a larger sum than the defendant admits to be due, and which beyond the amount so paid in he is at liberty to dispute on some one or other of the various grounds of defence already noticed.

Thus in an ordinary action for goods sold and delivered, where the demand is made up of several distinct items, the payment into court of part admits no more than that the sum paid in is due; *Meager v. Smith*, 4 B. & Ad., 673; *Seaton v. Benedict*, 5 Bing., 32. The plaintiff cannot apply the amount paid in to any particular items he may please to select, so if the defendant relies on the Statute of Limitations as to some of the goods, and pays money into court for the rest, such payment will not take the case out of the statute; *Long v. Greville*, 3 B. & C., 10. And where the plaintiff insists on several claims, some legal and others illegal, and the defendant pays money into court, the court will apply the payment to the legal claim, for the defendant cannot give an illegal contract validity by his admission. *Ribbons v. Wickett*, 1 B. & P., 264.

Where however the plaintiff claims under a special contract for the sale and purchase of the goods, payment into court under it admits the contract. Thus, where the contract was to pay a particular sum of money for certain articles, payment of part of the money into court, by admitting the contract, admits also the sum originally due;

and the only question is as to the remainder; *Cox v. Brain*, 3 Taunt., 95; *Stocold v. Brewin*, 2 B. & A., 118. But where the agreement was to pay for goods sold at the average price to be ascertained on a day specified, payment into court does not admit the average price to be as claimed, but only that the average has been struck. *Stocold v. Brewin*, *ibid.* See also *Everth v. Bell*, 7 Taunt., 450. *Roscoe*, 6th edit., p. 46.

EVIDENCE IN ACTIONS FOR THE PRICE OF GOODS SOLD AND DELIVERED, WHERE THE GOODS WERE SUPPLIED BY A THIRD PARTY.

The evidence in an action for goods sold and delivered in the ordinary case where the goods were supplied in fact by the plaintiff has been stated. The necessary evidence for a plaintiff, where the goods were supplied by a third party, is now to be considered. This state of facts arises generally where the goods were sold either by an agent of the plaintiff, or by one or two or more partners.

GOODS SOLD AND DELIVERED BY AN AGENT.

In every case in which the contract of sale, either express or implied, was made with some other party than the plaintiff, but acting on his behalf, the plaintiff must show that the party who made the preliminary agreement or sold the goods was his agent.

The relation of principal and agent generally exists either in the case of a mercantile agent, or in the case of a domestic servant. An agent appointed for commercial purposes is either a factor or a broker. A *factor* is employed by a merchant, or other person, and is intrusted with the possession and apparent ownership of the goods to be sold by him for his principal. A *broker* has not the custody of the goods of his principal. He is merely empowered to effect the contract for the sale. *Chitty on Contracts*, 3rd edit., p. 210.

Where the goods were delivered by a shopman or servant of the plaintiff, the fact of the agency in the transaction is necessarily inferred from the situation of the party, but cases sometimes occur where an agent has sold goods as his own without disclosing to the purchaser the name of his employer. In such cases the party who was the real owner of the goods may in general bring the action in his name,

1 Geo. IV., c. 94, s. 6; but he must in addition to the ordinary proof of contract, delivery, and price (*ante*, p. 3) shew that the party selling was in fact merely his agent.

The servant or agent cannot sue upon a contract entered into by him in that character unless he has some *beneficial interest* in its completion, in respect of commission, or otherwise, or a special property or interest in the subject-matter of the agreement, as in the cases of a factor, or broker; or a carrier; or a warehouseman; or an auctioneer; or other similar agent acting for reward, or having a special property or interest, and not being a mere servant. These may sue, unless the principal or real owner elect to bring the action in his own name, but the agent sues subject to any set-off against the principal. And if an agent or servant appear to be the principal, and act as such, and become personally responsible on the contract, he may sue in his own name thereon; for his responsibility gives him an interest in the contract or transaction, and forms a consideration for the contract with or promise to him. *Chitty on Contracts*, 3rd edit., p. 230, and cases there cited.

A plaintiff who has professedly made a contract as agent for a third person, may sue thereon as a principal, if the defendant, before the action be brought, has notice that he (the plaintiff) is the party really interested. *Rayner v. Grote*, 16 L. J., Ex. 79.

The agent is a competent witness for either party.

Evidence for the defendant.—Whatever is a good defence to an action where the goods were in fact sold by the plaintiff, will also be a good answer when the goods were sold by an agent, for the plaintiff cannot avail himself of the contract and act of his agent without also being subject to all its terms, defects, informalities, and consequences.

Payment.—When an agent sells goods as his own without naming his principal, payment to the agent is an answer to any action by the principal.

The 6th Geo. IV., c. 94, s. 4, provides that any person may contract with an agent intrusted with any goods, or who is the consignee thereof, for the purchase of such goods, and may receive the same and *pay* for the same to such agent; and such contract and payment shall bind the owner, although the purchaser was aware of the agency, provided the contract and payment be made in the usual and ordinary course of business, and the purchaser at the time of the sale or payment had no notice that the agent was not authorized to sell the goods or receive the purchase money.

A payment of cash to a traveller who collects orders in

the country binds the principal, but not a payment in other goods; *Howard v. Chapman*, 4 O & P., 508.

In answer to the defence of payment to the agent, the principal may prove that the defendant received notice at or before the time of payment that the agent was not authorized to receive the money.

Set-off.—Not only can the defendant avail himself of any defence which is available where the plaintiff is a party to the sale and purchase of the goods, but he can set off any debt due from the agent to him against the demand of the principal, 6 Geo. IV., c. 94, s. 6, a privilege which he does not possess where the agent acts openly for and avows the name of the party whom he represents, for this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal, but with an agent, the reason of the above rule ceases, and then, *cessante ratione, cessat lex*; *Smith's Leading Cases*, 2nd edit., vol. ii., p. 79. Thus, in *Baring v. Corrie*, 2 B. & A., 137, Coles and Co., who were brokers and also merchants, sold to Corrie and Co. in their own names, sugars belonging to Baring, Brothers, and Co., who brought this action for their price. The true nature of the contract was entered by Coles and Co. in their broker's book, which the defendants might, if they pleased, have seen. Nor had Coles and Co. the possession of the sugars, which were lying in the West India Docks, whence, by the usage of the docks, they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set-off against the plaintiff's demand for the price of the goods, a debt due to them from Coles and Co.

In a later case it was held by the Court of Exchequer, that a purchaser might set-off payments made to a factor, if he believed that the factor had a right to sell, and did sell to repay himself advances.—*Warner v. Mac Kay*, 1 M. & W., 595; *vide Smith's Leading Cases*, 2nd edit., vol. ii., p. 79—80.

If an agent employed to sell coals, make a bargain in his own name with a tradesman to furnish him with coals on credit, for which in return he is to receive goods on credit, and the coals and the goods be both delivered, the real owner and seller of the coals may recover the price from the tradesman, if his, the real owner's name, be in the tickets sent with the coals; because the tradesman having such tickets

is bound to inquire into the nature of the agent's situation, and should not continue to treat him as principal.—*Pratt v. Willey*, 2 C. & P., 350.

GOODS SOLD AND DELIVERED BY ONE OF TWO OR MORE PARTNERS.

Where a party selling goods has a partner in the profits arising from such sale, he must join that partner as a plaintiff with himself in the action, whether the transaction was confined to dealings with only one partner, or was with both or all of them.

As to proof of partnership, *see post*, *Evidence in action for goods supplied to partner*.

Evidence for the defendant.—As in the case of goods sold by an agent concealing the name of his principal, so in the case of an action by two or more partners where the goods were sold by one, and the names of the others concealed, the defendant can avail himself not only of any defence which he might set up if the contract had been in fact made with all, but he can set off a debt due to him from the partner with whom the contract was made, provided he was ignorant when he contracted the debt sought to be recovered, that the plaintiff had a partner, and that he trusted the plaintiff as sole proprietor before he was aware that he had such a partner.

EVIDENCE IN ACTIONS FOR THE PRICE OF GOODS SOLD AND DELIVERED, WHERE THE GOODS WERE SUPPLIED TO A THIRD PARTY.

Wherever goods are delivered to a third person at the defendant's request, proof of the delivery and the request will support an action against the defendant, and the plaintiff may be entered as for goods sold and delivered to the defendant.—*Vide Bull v. Sibbs*, 8 T. R., 328. Independently, however, of any express request or order by the defendant, he will in many cases be liable for goods delivered to third parties, as to a servant, carrier, agent, partner, wife, or child.

GOODS SUPPLIED TO A SERVANT.

A master is liable for the contracts of his servant within the scope of his employment, on the ground of an authority delegated by the master, expressly or impliedly, to the servant. Thus, if a servant has been allowed by his master to

purchase goods upon credit, the latter is unanswerable even for goods bought by that servant, without his master's particular authority; but a master is not responsible for goods ordered by his servant in his name but without his authority, unless he has been in the habit of paying for goods so ordered; *Maunder v. Conyers*, 2 Stark., 281. If in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the servant subsequently buys on credit, until the credit is distinctly withdrawn, *Hazard v. Treadwell*, 1 Stra., 506; *Rusby v. Scarlett*, 5 Esp., 76; and see *Gilman v. Robinson*, R. & M., 227; *Filmer v. Lynn*, 4 N. & M., 559; though he has given the servant money to pay for the goods in some instances, *Wayland's case*, 3 Salk., 234; *Bolton v. Hillersden*, 1 Ld. Raym., 225. When the master gives his servant money to pay for commodities as he buys them, and has never authorized a dealing on credit, and the servant buys them without paying for them, and keeps the money, the master is not liable, *Stubbing v. Heinty*, Peake, 47; *Roscoe*, 6th edit., p. 278; *Fleming v. Hector*, 2 M. & W., 181; but where the servant is once authorized to pledge his master's credit, the latter is liable, although he subsequently furnish the servant with money to settle the demand, which he omits to do; *Wayland's case*, 3 Salk., 234; *Rusby v. Scarlett*, 5 Esp., 76. Where the master is in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesman suffer other additional goods of the same sort to be delivered, without informing the master, or satisfying himself that they were for his use, when in fact they were not, the master is not responsible, *Pearce v. Rogers*, 3 Esp. R., 214; so, if a master authorize a tailor to make two suits of livery a year for his servant, and the tailor supply one suit, and at the desire of the servant supply plain clothes instead of the other, the master is liable only for the one suit of livery supplied.—*Hunter v. Countess Berkeley*, 7 C. & P., 413.

The circumstance of the master having received the goods, or the benefit of the servant's contract, is *prima facie* evidence of his responsibility, and renders it incumbent on the master to discharge himself, by proving that the servant had no authority to pledge his credit; and although the authority given were exceeded, yet the master may become liable by subsequently, for a moment or in part, recognizing or assenting to his servant's contract or act.—*Ward v. Evans*, 2 Salk., 442. Whether the servant be invested with a general or special authority, the master is not bound if the servant's act or contract do not fall within the general

province or scope of his powers, and be wholly unconnected with the business intrusted to his direction; a domestic servant, therefore, could not bind his master by purchasing goods unconnected with domestic use, if not in fact authorised to do so.—*Chitty on Contracts*, 3rd edit., p. 219.

DELIVERY TO A CARRIER.

The delivery of goods by the vendor to a carrier, to be conveyed to the purchaser, is in general a good delivery to the purchaser, so as to place the goods at his risk, and consequently, though the goods be lost in the course of the conveyance, he must pay the price, although the particular mode of carriage adopted were not chosen by the consignee; *By Parke, B., Johnson v. Dodgson*, 2 M. & W., 656; *Alexander v. Gardner*, 1 Bing., N. C., 671; and this, although the goods were to be paid for one month “after arrival,” if other parts of the contract shew they were intended to be at the vendee’s immediate risk, *Fragano v. Long*, 4 B. & C., 219. In general, therefore, the plaintiff is not obliged to prove the actual receipt of the goods by the defendant; proof of the contract and the delivery to the carrier will suffice; and the delivery is complete, and an action for goods sold and delivered lies, although the carrier wrongfully refuse to resign the actual possession of the goods to the purchaser, and this more particularly if the latter recover against the carrier in an action of tort, for the wrongful detention; *Groning v. Mendham*, 5 M. & Sel., 189. However, the delivery to a carrier is incomplete to charge the vendee for the price of the goods, if lost, unless the vendor, in so delivering them, exercise due care and diligence, so as to provide the purchaser with a remedy against the carrier, in those instances in which some precaution is the duty of the seller; as if he neglect to book, or take a receipt for the goods, *Buckman v. Levi*, 3 Camp., 414; or do not insure, in pursuance of the carrier’s well-known notice, limiting his responsibility, &c., *Clarke v. Hutchins*, 14 East, 475; but where the vendee’s order was to send down more goods, Lord Ellenborough held that the vendor was not bound to insure, unless he had done so before; *Cottray v. Tate*, 3 Camp., 129; *Chitty on Contracts*, 3rd edit., p. 440.

DELIVERY TO AN AGENT.

A contract made by an agent, as such, is in law the contract of the principal. The agent is considered merely as a conduit. He is simply the medium by which the contract is effected. His assent is merely the assent of his principal; he need not, therefore, be competent to contract for himself;

so that infants, married women, outlawed persons, or aliens, may act as agents for other persons.—*Chitty on Contracts*, 3rd edit., citing *Co. Lit.*

Where goods are delivered to an agent, the seller may in general sue the principal. The following has been laid down as the rule on this subject by Lord Tenterden: "If a person sells goods, supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale, the seller knows that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandasequi* (4 Taunt., 574), and *Paterson v. Gandasequi* (15 East, 62), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other; *Thomson v. Dawsonport*, 9 B. & C., 88. The mere knowledge, at the time of the contract that there is a principal, his name not being disclosed, will not prevent the seller, who has debited the agent, from afterwards resorting to the principal.—*S. C.*, *ibid.*, *Roscoe*, 6th edit., p. 277.

Upon the principle that the contract of an agent is the contract of the principal, an agent is not liable upon an agreement which he makes in his representative capacity; provided he do not personally contract or expressly pledge his own credit, by concealing his principal or otherwise; and provided he do not so far exceed his powers as to render his principal irresponsible; and where a person enters into a contract in writing describing himself as agent, and naming his principal, the principal is bound, and the agent is not liable, if he had authority to enter into the contract on behalf of the principal; *Downman v. Jones*, in error, 14 L. J., Q. B., 226; but if a person contract as agent for a third party, having in fact no authority to do so, he may be sued personally; but then it must be shown that he acted without authority; *Wilson v. Barthrop*, 2 M. & W., 863. If brokers, on selling goods, send in invoices, or bought and sold notes, in their own names as sellers, they

may be sued personally, and verbal evidence would be inadmissible on *their* behalf to show that they sold as agents for third parties.—*Jones v. Littledale*, 1 Nev. & P., 677.

The rules of law by which the extent of an agent's authority to bind his principal is regulated, are in general the same, whether such agent be appointed for commercial or domestic purposes. Of course, however, the nature of the employment, and the difference of the pursuit, will occasion some distinctions. The leading principles are, however, the same in both cases. Thus it is always material to ascertain, when the power of an agent is the point at issue, whether he be a general or a special agent. The *implied* authority arising from general employment continues, it seems, even after the agency has in reality ceased as regards parties who have before given and continue to give credit to it, and who have not actually received, and cannot be presumed to have had, notice of the change.—*Chitty on Contracts*, 3rd edit., p. 214, 215.

When the defence is that the contract was made with another party, the topic generally made use of on the part of the plaintiff is, that the defendant has received the goods and wants to keep them without paying for them. It is quite admissible in such a case for a defendant to shew that in pursuance of his contract he has actually paid for the goods to the party upon whose order he contends the plaintiff delivered them. Where in an action for goods supplied for the building of cottages, the question was whether the goods were supplied to a builder afterwards bankrupt, or to the defendant who had employed the builder, and the defendant called the builder, who stated that the plaintiff's contract was made with himself, and that he had received money from the defendant in respect of the cottages; it was held that he might also be asked by the defendant which way the balance was between him and the defendant at the time of the bankruptcy.—*Gerish v. Chartier*, 14 L. J., C. P., 84.

Liability of members of a company.—The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club; it appearing that the committee are supplied with funds by the members who are subject only to annual subscriptions and to other ready money payments, and that the committee have no express authority to bind the members by contracts; *Fleming v. Hector*, 2 M. & W., 172. And it seems that such committees are not generally authorized to deal on credit; therefore the party who supplies goods on credit can only sue

those members of the committee who were privy to the contract, unless he can prove that such dealing was one of the purposes for which the committee was appointed, *Todd v. Emly*, 7 *M. & W.*, 427; nor are the committee liable, as such, on the contract of their servant, the house-steward, unless there be proof of an authority from them.—*Todd v. Emly*, 8 *M. & W.*, 505; *Roscoe*, 6th edit., p. 277.

The shareholders in a mining company, conducted by directors, are personally liable on the contracts made by directors for the supply of the mines, where such contracts are necessary or usual, or where the defendant (a shareholder) can be shown to have authorized such contracts, *Tredwen v. Bourne*, 6 *M. & W.*, 461; *Steigenberger v. Carr*, 3 *M. & G.*, 191; and such shareholders are partners, and therefore liable on all customary contracts with strangers made by their agents, though there may be an agreement *inter se* not to deal on credit, unless the plaintiff knew that the goods were ordered without the authority of the defendant; *Hawker v. Bourne*, 8 *M. & W.*, 703. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent,) before that capital was raised, the defendant was held not liable on their contract; *Pitchford v. Davis*, 5 *M. & W.*, 2; see *Herand v. Leaf*, 15 *L. J. C. P.*, 57.

Liability of provisional committee-men.—The liabilities of provisional committeemen of railway and other joint-stock companies, have been recently much discussed in the superior courts. The ordinary law of principal and agent is applicable to them, for a provisional committee is not a partnership, nor is there any peculiar right or liability growing out of that relationship; a member of such a committee is, therefore, answerable only for debts that he has incurred by order personally, or through an agent duly authorized to contract for him.

The following are put forth as the rules established by the decisions, as to the acts from which an authority to pledge credit may be inferred in these cases:—

Where the defendant has never attended a meeting, nor taken part in the management, in no case is he liable.

If he have joined the committee and attended preliminary meetings at which orders have been given, he is liable, although a managing committee be subsequently appointed, of which he is not a member.

But he is not liable for orders given after his consent to join, but before his actual attendance.

After he has attended, his liability continues for orders

given for things necessary for the purposes of the committee, although he may not actually be present at the giving of such orders, or expressly consented thereto: his authority to his brother committee-men to pledge his credit, will be implied from the fact of his having once taken part with them in the conduct of the concern.

If he join a provisional committee, and attend a meeting at which a managing committee is appointed, he will be presumed thereby to have authorized such orders as the latter may give, and which are proper for the carrying on of the project.

This liability will continue until he does some act whereby his determination to withdraw may be fairly presumed to be known to the parties dealing with the committee.

But where there is a managing committee appointed in the absence of the defendant, no authority to them to pledge his credit will be implied.

And where there is a managing committee, the presumption will be that the orders are given by them on their own responsibility, unless it be shewn that the defendant has expressly, or by implication, by some *act done*, given to them an authority to pledge his credit.

No presumption of an authority to pledge credit arises from the mere relationship of members of a provisional committee one with another, or from their relationship to a managing committee, but in all cases such authority must be proved.

And such authority may be proved, either expressly, or by acts from which an intention to give such authority may be implied.

Where no such acts are proved, there is no case for the jury; but where there is any evidence from which an authority may be implied, the question of its value is for the jury.—*Law Times*, vol. x., p. 448.

The recent cases bearing on the above points, are *Wood v. Duke of Argyle*, 13 L. J., C. P., 96; *Lake v. Duke of Argyle*, 14 Id., Q. B., 73; *Harrison v. Heathorn*, 6 M. & G., 1; *Barnett v. Lambert*, 15 L. J. Ex., 305; *Reynell v. Lewis*; *Wyld v. Hopkins*, 16 Id., Ex., 25; *Cooke v. Tonkin*, Id., Q. B., 153; *Dawson v. Morrison*, Id., C. P., 241.

DELIVERY TO A PARTNER.

A question frequently arises in actions for goods sold and delivered whether a person is liable for goods as the partner of another by whom they were ordered and to whom they have been delivered. Where there is such a partnership, the plaintiff may sue all or any of the parties, for the 9th

and 10th Vict., c. 95, s. 68, enacts, that where any plaintiff shall have any demand recoverable under this Act against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process, and judgment may be obtained and execution issued against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued, or may not be within the jurisdiction of the court.

A dormant partner *may*, therefore, at the option of the plaintiff, be joined as a defendant, or sued alone, *Lloyd v. Archboulde*, 2 Taunt., 327; *Russell v. Roberts*, 4 Nev. & M., 31; the act of one partner, made with reference to business transacted by the firm, will bind all the partners, although in a matter wholly unconnected with the partnership, one party cannot bind the others.

An agreement to share in equal or unequal proportions, the profits of a concern, decisively fixes the joint responsibility of all the participators, as partners, though some were not known to be such at the time by persons dealing with the firm. It is not necessary, to constitute a liability as a partner, that there should be a communion of losses. If there be a right to a share of the profits, the party is liable, although it were agreed that each individual should sustain his own losses.

To render a person liable for the contract of another as his partner, it is not always necessary that an actual partnership should exist between them, for a *nominal* partner may be so liable. A nominal partner is one who, without having an actual interest in the profits of a concern, or being in reality a partner, allows his name to be used, or agrees that it shall be continued therein as a partner; and such person clearly is liable as a partner, although the particular creditor was ignorant at the time of dealing, that the name was used, *Waugh v. Carter*, 2 H. Bla., 242; thus, though, in point of fact, parties are not partners in trade, yet if one so represent himself, and thereby gets credit for goods for the other, both are liable. See *Lord Kenyon, C. J., De Bergh v. Smith*, 1 Esp., 29; *Kell v. Nainby*, 10 B. & C., 21. So, persons who have been appointed directors of a joint-stock company are liable, not having expressly retired from the direction, *Doubleday v. Muskett*, 7 Bing., 110; and if the name of a clerk be used in a firm with his own consent, he is liable to third persons as a partner, though he receives no part of the profits; *Guidon v. Robson*, 2 Camp., 302. Persons may be partners in a particular concern or business, yet if they do not hold themselves out as general partners, it will not make them liable in other

cases not connected with such particular business; *De Berkhorn v. Smith*, 1 *Esp.*, 29; and where there is a stipulation between A, B, and C, apparent copartners, that C. shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation; *Alderson v. Cope*, 1 *Camp.*, 404 (n.); *Batty v. McCundie*, 3 *C. & P.*, 202. If a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm.—*South Carolina Bank v. Case*, 8 *B. & C.*, 427; *Vere v. Ashby*, 10 *B. & C.*, 293.

However small the portion of profits received, it renders the party liable to all the engagements of the partnership, *R. v. Dodd*, 9 *East*, 527; and it is immaterial whether the plaintiff knew at the time of his dealing with the concern that the party whom he charges as a partner, participated in the profits, *ex parte Gellar*, 1 *Rose*, 297; *Vere v. Ashby*, 10 *B. & C.*, 288; *Roscoe*, 6th edit., p. 273; but if the individual dealing with one partner, is guilty of any fraud, there is no claim against the firm, *Shiriff v. Wilks*, 1 *East*, 48; where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly by pawning converts to his own use, if there were no collusion between him and the seller, this is to be considered a partnership transaction, and this innocent partner is liable for the price of the goods without proof of any previous dealings between the parties.—*Bond v. Gibson*, 1 *Camp.*, 185.

To render a party liable as a partner on account of his interest in the concern, his participation must be in the profits *as such*. Therefore a remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his principal, in lieu of a fixed salary, is only a mode of payment adapted to increase or secure exertion, and does not render the party a partner; *Cheap v. Cramond*, 4 *B. & A.*, 670. So, a person employed to sell goods, and who was to have for himself whatever money he could procure for them above a stated sum, was held not to be a co-partner; *Benjamin v. Porteus*, 2 *H. Bla.*, 590. So, if there be an agreement between A, the owner of a lighter, and B, that B shall work the lighter, and in consideration of the working have half the gross earnings, this is only a mode of paying wages, and not a partnership in the profits; *Day v. Boswell*, 1 *Camp.* 329. So, an agreement that a sailor shall receive a certain share of the produce of the voyage in lieu of wages, does not make him a

partner with the owners of the cargo; *Wilkinson v. Fraser*, 4 *Esp.*, 182; *Mair v. Glennie*, 4 *M. & S.*, 244. But an agreement between two persons, that one of them should make purchases of goods for the other, and in lieu of brokerage should have one-third of the profits arising from the sales, and should bear a certain proportion of the losses, makes him liable as a partner as to third persons; *per Holroyd, J., Smith v. Watson*, 2 *B. & C.*, 409. A distinction has been taken between receiving a share of the profits which renders a party liable as a partner; and relying on the profits as a fund for payment, which will not have that effect; see *Grace v. Smith*, 2 *W. Bl.*, 998; *ex parte Hammer*, 17 *Ves.*, 404.

In the case of a partner retiring from the firm, and withdrawing his name therefrom, the distinction is, that he still remains liable, if he agree to receive, notwithstanding his secession, a share of the profits, as such, indefinitely; otherwise if he be merely entitled to a certain annuity, or fixed sum, not dependent upon or payable according to the profits, but payable at all events; and in such case there is no objection to the outgoing partner relying upon the profits, merely as a fund for payment of the money secured to him; *Waugh v. Carver*, 2 *H. Bl.*, 247; *Smith's Leading Cases*, vol. i.; *Barry v. Nesham*, 16 *L. J. C. P.*, 21.

Where a dormant partner quits the partnership without any public notice, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant that he had ever been a partner; *Carter v. Whalley*, 1 *B. & Ad.*, 11; *Heath v. Sansom*, 4 *B. & Ad.*; *Evans v. Drummond*, 4 *Esp.*, 89. Knowledge by a creditor of a dissolution of partnership, the transfer of his account from the old to the new firm, and his continuing to deal with the new firm, will be evidence of accepting the latter as his debtors, and will therefore release the retiring partner; *Kirwan v. Kirwan*, 2 *O. & M.*, 617; see *Hart v. Alexander*, 2 *M. & W.*, 484; *Roscoe*, 6th edit., p. 272. If an infant partner do not, on coming of age, repudiate the partnership, he will be liable on the subsequent contracts of the firm; *Goole v. Harrison*, 5 *B. & Ald.*, 147.

Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract, on which all the overseers were liable to be sued, including the assistant overseer who had signed; *Kirby v. Banister*, 5 *B. & Ad.*, 1069.

There is no liability as a partner where there is neither a

participation of profits, nor any use made of the party's name to obtain credit, although there may be to a certain extent a community of interest. Thus a purchase by one of several parties, on an agreement between them that each shall have a distinct share of the whole, without any communion of profit, does not create a partnership between them, so as to render them jointly liable to third persons; *Coops v. Eyre*, 1 *Hen. Bla.*, 37. And where there is no joint purchase, but the contract is made by one party only, a subsequent joint interest and communion of profits will not constitute a joint liability upon such contract; see *Beale v. Moulds*, 16 *L. J.*, *Q. B.*, 410. But where the agreement is for a joint purchase, the joint interest and partnership commences, and the joint responsibility attaches immediately the goods are bought, though at the time of the sale one partner only was known and the credit was given to him; *Gouthwaite v. Duckworth*, 12 *East.*, 421; *Smith v. Watson*, 2 *B. & C.*, 401. And therefore where A, at the suggestion of B, by letter, ordered a cargo of timber from C, and the invoice was made in the name of A, and a bill of exchange was drawn by B on A for the amount of the freight, and paid by the latter; it was held, in an action brought by C against A and B for the price of the goods, that it was competent to C to show that A and B were jointly interested in the purchase; *Ruppel v. Roberts*, 4 *N. & M.*, 31. So, where it appeared that the plaintiffs, carrying on business as stationers, supplied paper to the defendants by order of A, a printer, to whom credit was given; and A afterwards became bankrupt, when it was discovered that defendants and A were jointly interested in the publication of the work for which the paper was used; and the jury having found that a partnership existed between the defendants and A at the time the paper was ordered, it was held that the defendants were liable. *Gardiner v. Childs*, 8 *C. & P.*, 345; *Chitty on Contracts*, 3rd edit., p. 246.

Where several parties dine together at a tavern, they are jointly liable for the whole expense, and not merely each for his own share; *Foster v. Taylor*, 3 *Campb.* 49; but the officers of a regimental mess are only separately liable for their individual shares. *Id.*, *Brown v. Doyle*, *ib.*, p. 51.

If the proprietors of a stage coach divide the road into different quarters; and the various proprietors are severally the owners of the horses and harness which draw the coach through their respective districts; and severally provide their stabling, food, and horsekeepers, in their districts, and the profits are divided in proportion to the number of miles; and it is notorious on the road that the proprietors

separately horse the different stages, and that the tradesmen on the road give credit to the separate proprietors for goods furnished to them; and there is no evidence that purchases made by the separate proprietors are, upon the general adjustment of accounts between all the proprietors, computed as part of the general outgoings; and if goods are delivered to one of the proprietors, for the use of his horses by a vendor who is the owner of the stable where such horses are kept, and who receives part of the price of the goods by a bill drawn on such proprietor only, and who expresses his fears, upon the failure of such proprietor, that he shall lose the residue; such vendor can recover only from the proprietor with whom he immediately dealt, though such facts might constitute a partnership as between the parties themselves. *Barton v. Hanson*, 2 Taunt., 49.

Proof of partnership.]—Where there is a deed of partnership between the party sought to be charged and the party to whom the goods were in fact delivered, the production and proof of the deed will be the best evidence of the partnership, but although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stack., 405.

Where however a question arises as to whether the defendant was in fact a partner so as to render him liable for goods delivered to his alleged copartner, it is seldom that any deed of partnership in fact existed, and the question has to be determined by the acts of the parties and the general circumstances of the case.

The subsequent approval and recognition by the firm of the act or contract of one of the partners, or their privity and silence, afford powerful evidence that he was invested with a sufficient prior authority to bind all the partners. So acts subsequent to the time of delivering goods on a contract may be admitted as evidence to show that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; *Saville v. Robertson*, 4 T. R., 720; *Gardner v. Childs*, 8 C. & P., 345. But if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner, not even an acknowledgment that he is liable, or accepting a bill of exchange drawn on them, as partners, for the very goods, will make him liable in an action for goods sold and delivered; although he may be liable to an action on the bill of exchange. *Id.*, and see *Ridgway v. Philip*, 1 C. M. & R., 415.

If no actual partnership existed, and the plaintiff relies on the admissions of the defendants, proof that the defen-

dants suffered their names to be used as partners will be sufficient. If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he is liable to the plaintiff in all transactions in which he gave credit to the defendant upon the faith of his being such partner. *Per Parke, J., Dickinson v. Valpy*, 10 B. & C., 140.

The plaintiff must show that the name of the defendant was used in the firm with his own consent; *Newsome v. Coles*, 2 Camp., 617; *H. Bl.*, 235 (n.), 4th edit. Where a person allows his name to remain in a firm, either exposed to the public over a shop door, or used in printed invoices or bills of parcels, or published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is stopped from disputing his liability as a partner. *Per Tindal, C. J., Fox v. Clifton*, 6 Bing., 794.

An examined copy of an Answer in Chancery by two of the defendants to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the person so answering. *Studdy v. Sanders*, 2 D. & R., 347; *Roscoe*, 6th edit., p. 273.

Where the defendant, a member of a copartnership, of which A is one, withdrew from it, and the partnership became indebted to a banking firm of which A was also a member, the knowledge by A of the retirement of the defendant was held not to be an actual or constructive notice of that fact to the bank. *Powles v. Page*, 15 L. J. C. P., 217.

DELIVERY TO WIFE.

Generally speaking, proof of the order by and delivery of goods to a wife, if living with her husband, will support an action against the husband for the price. The liability of a husband on his wife's engagements during marriage rests solely on the idea that they were formed by his authority; and if his assent do not appear by express evidence, or by proof of circumstances from which it may reasonably be inferred, he is not liable.

Liability of husband when wife living with him.—A wife living with her husband, with respect to certain contracts, namely, such as relate to necessities for her husband's family, may be regarded as his general agent; possessed

of a general and presumed authority, arising from the duty and liability of the husband to provide his wife and children with necessaries; and the presumption that he assents to arrangements for their benefit, of which he cannot but be cognizant. The contract is the agreement of the husband, by the intervention of the wife; not the personal contract of the wife; *Emmet v. Norton*, 8 C. & P., 506. Cohabitation is strong presumptive evidence of the husband's assent to agreements made by her for the supply of goods, for herself or her husband's household, during that period; *Montague v. Benedict*, 3 B. & C., 631. Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. And this liability depends, not strictly on the real circumstances of the husband, but on the appearance which he allows his wife to assume in society. When a tradesman is thereby deceived, the loss must fall upon him who connived at the deception. *Waithman v. Wakefield*, 1 Camp., 121.

If necessaries are supplied, the assent of the husband may be fairly presumed; but mere proof of the husband's cohabitation with his wife will not, it seems, be sufficient to establish his authority so as to render him liable upon her contract for goods which are not necessaries suitable to the husband's circumstances and station of life. And whatever the amount of the husband's income may be, the extravagant nature of the wife's order is a matter fit for the consideration of the jury in determining whether the wife acted as the husband's agent; *Lane v. Ironmonger*, 14 L. J., Ex., 35, recognising *Freestone v. Butcher*, 9 C. & P., 647. Proof, however, of a husband's having paid for articles ordered by his wife on former occasions is relevant evidence to go to a jury, upon a question whether or not she had, on a subsequent occasion, ordered other goods by his authority; *McGeorge v. Egan*, 5 Bing. N. C., 196. Where the plaintiff, a jeweller, delivered jewellery to a wife to an amount inconsistent with her and her husband's fortune, and it appeared that she had at the time of her marriage jewellery suitable to her condition; and that she had never worn in her husband's presence any articles furnished by the plaintiff, who, when he went to the husband's house to ask for payment, always inquired for the wife and not for the defendant, it was held that the goods were not necessaries, and as there was no evidence of any assent of the husband to the contract, he was not liable; *Montague v.*

Benedict, 3 B. & C., 633. So, where the plaintiff, a linen-draper, supplied goods to the wife, the whole of which were delivered to her in the plaintiff's shop, with the exception of a small parcel received by her at her husband's door, and there was no proof that the husband ever gave any authority, express or implied, to the plaintiff, or knew of her purchases or possession of the things, but that he had supplied her wardrobe abundantly, it was held that the husband was not liable. *Seaton v. Benedict*, 5 Bing., 28.

So strong, however, is the presumption of the husband's assent during cohabitation, that even the adultery of the wife, during that period, does not destroy it as to her contracts after the adultery and before the husband and wife separated; *Robinson v. Greinold*, 1 Salk., 119. And if, after an adulterous elopement, he takes her back, he is liable for necessaries subsequently supplied. *Harris v. Morris*, 4 Esp., 41.

But even cohabitation, and a knowledge on the part of the husband that his wife has contracted for goods, are only presumptive, not conclusive evidence of his assent and consequent liability. The presumption may be repelled by circumstances, evincing that the tradesman gave credit solely to the wife; and if the jury find that to be the fact, he is not liable. Where a milliner supplied the defendant's wife, upon her order, with articles to an amount unsuited to her husband's circumstances, and there was no evidence that he knew of the dealings with the plaintiff, although at the time he lived with his wife, but it was proved that a former account with the plaintiff, without the defendant's knowledge, was paid by the wife's father, who requested that no further credit should be given to her without her husband's sanction, and that the plaintiff had taken the wife's promissory note for the amount, it was held that the husband was not liable for the goods, on the ground that they were not supplied on his credit but on the wife's; *Micalfe v. Shaw*, 3 Camp., 22. And where the wife had accepted bills of exchange drawn upon the husband for previous accounts for dress, and the plaintiff, on the dishonour of one, applied to her for payment, and not to the defendant, and the wife had said in the presence of her husband and of the plaintiff that her husband never paid her bills, she always paid her own, it was held that a verdict for the plaintiff on these facts was against the evidence, although it was proved that the wife had in her husband's presence worn some of the articles furnished by the plaintiff. *Bentley v. Griffin*, 5 Taunt., 356.

Where the wife ordered goods to be delivered to her mother, saying her husband would pay for them, which he

did; and she subsequently ordered other goods in like manner, it was held that there was evidence to go to the jury of the wife being authorized to order the latter goods. *Filmer v. Lynn*, 4 N. & M., 559.

If a man cohabit with a woman, and allow her to pass as his wife without being married to her, he is liable for goods furnished to her, even by a tradesman who knew that the parties were not married; for the assent and the authority of the former in such case are to be inferred. *Watson v. Threlkeld*, 2 Esp. R., 637; *Robinson v. Nahon*, 1 Camp., 245.

Where the husband expressly warns the tradesman not to trust his wife, he cannot (unless he has wrongfully turned away his wife, *see post*) be charged with goods subsequently provided; and a notice to the servant usually employed by the tradesman, is notice to the latter; *Etherington v. Parrot*, 1 Salk., 118. It seems, however, that during cohabitation, a general or public prohibition, not proved to have reached the particular party, will not rebut the presumed power of the wife to bind the husband by her contracts for actual necessities. *Manby v. Scott*, 1 Sid., 127.

It frequently happens, especially in London, that a married woman carries on a trade personally, and apparently on her own account. It seems that if the husband is aware that she carries on the business, and resides with his wife, and receives the profits, a legal presumption arises that the wife conducted the trade as his agent; and he is liable for articles furnished in the business, though the invoices and receipts are in the name of the wife, and she was rated to and paid the poor's and paving rates; and where a wife carried on business on her own account during the imprisonment of her husband; and, after his return, articles were furnished in the same business with his knowledge, he was held liable for these articles, although the invoices and receipts were made out in the wife's name; *Petty v. Anderson*, 2 C. & P., 38; 3 Bing., 107. But where A, who kept a fruiterer's shop, became bankrupt in the year 1824, but did not surrender to his commission, and from that time to 1833 the business was carried on by A's wife; fruit was supplied her between the years 1828 and 1832 to an amount exceeding 266*l.*, and evidence was given that A was seen in London a few times between 1824 and 1833; and was arrested at the shop in 1833; and that he attended the marriage of his daughters at Marylebone Church; it was held that proof of these facts was not evidence to go to the jury to show that A's wife acted as the agent of A,

so as to charge him with the price of the fruit," although it might be sufficient to charge him with necessities supplied to the wife. *Smallpiece v. Dawes*, 7 C. & P., 40.

Liability of husband when wife not living with him.—If the wife is separated from her husband by mutual consent, and receives a sufficient sum for her support, suitable to his degree and circumstances, the husband cannot be charged even for necessities provided for her; although the separation be not by deed, and there was no written agreement between them with respect to the allowance; and although the tradesman had no notice of such allowance; *Mizen v. Pick*, 3 M. & W., 481; unless the plaintiff had trusted her before, and was not aware of the separation; *Ozard v. Darnford*, 1 Sel. N. P.; and it had taken place so recently that it could not have become a matter of notoriety in the place where the husband resided; *Raoulx v. Vandye*, 3 Esp., 250. The same rule holds if the wife have sufficient necessities, either from her own resources, *Ludlow v. Wilmot*, 3 Stark., 86, or provided for her, though not by the husband, *Dixon v. Hurrell*, 8 C. & P., 717; and it is immaterial that such necessities have not been paid for; *Atkins v. Curwood*, 7 C. & P., 758.

If the husband and wife have parted by consent, unless the former makes her an adequate allowance, he remains liable for necessities supplied to her; *Hodgkinson v. Fletcher*, 4 Camp., 70; *Hindley v. Marquis of Westmeath*, 6 B. & C., 211. The question in all these cases is one of authority. If the wife has a sufficient separate allowance, to support herself with every thing proper to her maintenance, then she is not her husband's agent to pledge his credit, and he is not liable. By *Alderson, B.*, *Mizen v. Pick*, 3 M. & W., 481.

Where a husband, not permanently separated from his wife, makes an allowance to her for the supply of herself and family with necessities during his temporary absence, and a tradesman, with notice of this fact, supplies her with necessities on credit, the husband is not liable, *Holt v. Brien*, 4 B. & Ald., 252; *Bird v. Jones*, 3 M. & R., 121; and if the goods supplied be not necessities, it seems not to be material that the tradesman should have notice of the allowance. *Dennys v. Serjeant*, 6 C. & P., 419.

The husband is responsible if, notwithstanding the sufficiency and due liquidation of the allowance, he has promised to pay her debt; *Hornbuckle v. Hornbury*, 2 Stark. R., 177; see 1 M. & Rob., 185, note. But where the subsequent promise is conditional, and the husband is only liable in respect of such promise, the plaintiff must shew that the

condition has been complied with. *Holt v. Brien*, 4 B. & Ald., 252.

After a man has separated from a woman with whom he had cohabited, but who is not his wife, he may discharge himself from liability, even from necessities subsequently supplied, by proving that they were not lawfully married; *Munro v. De Chamant*, 4 Camp., 215.

A husband is liable for necessities provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directs the alimony to be paid from a date before the time when the necessities were provided; *Keegan v. Smith*, 5 B. & C., 375. And after a divorce for adultery in the husband, and a decree of alimony, the husband is liable for necessities supplied to the wife, if he omit to pay the alimony; *Hunt v. De Blaquiere*, 5 Bing., 550. The adequacy of the allowance is a question for the jury, even if a sum had been once fixed by the Ecclesiastical Court, pending a suit for divorce, and on its dismissal the husband paid a smaller sum. *Hodgkinson v. Fletcher*, 4 Camp., 70; *Emmett v. Norton*, 8 C. & P., 506. After a divorce on the ground of nullity, the liability of the husband for the debts of his late wife does not continue; *Anstey v. Manners*, Goss, 10.

Where a husband wrongfully turns away his wife, there is an implied credit for necessities, which as a wrong doer he is not permitted to repel. In such a case he cannot by a general advertisement in the newspapers, or even by a particular notice to individuals not to trust her, exempt himself from a demand for necessities suitable to his station and circumstances, furnished to her whilst so living apart from him, even by a person who had been desired by him not to trust her; *Todd v. Stokes*, Ld. Raym., 444. But if he can show a consent and agreement on the part of the tradesman not to charge him with goods supplied to the wife, it may afford him a defence. *Dixon v. Hurrell*, 8 C. & P., 720.

And it is a well-established principle, that if a husband personally ill-treat his wife, and be guilty of cruelty towards her, so that, from reasonable apprehension of further personal violence, she is obliged to quit his roof, he is responsible for necessities to the same extent as if he had expelled her therefrom, and, under such circumstances, a request by him that she would return will not, it seems, determine his liability for necessities supplied to her during their separation. *Emery v. Emery*, 1 Y. & J., 501; *Chitty on Contracts*, 3rd edit., p. 174.

Where a wife is guilty of the crime of adultery, and

either elopes from her husband, or is by him expelled from his roof on that account; or even where, being compelled by his cruelty to leave him, she is afterwards guilty of this offence, and he refuses to receive her, he is not liable even for the bare necessities of life supplied to her after her adultery and during their separation, although he do not generally or specially prohibit tradesmen from trusting her; *Morris v. Martin, Stra.*, 647, 706; *Hardie v. Grant*, 8 C. & P., 512; and although he himself has likewise committed adultery, and has turned his wife out of doors, and she offer to return. *Govier v. Hancock*, 6 T. R., 603.

If a wife improperly leave her husband *without his consent*, and continue absent from him, he is not liable to a tradesman, who, after an express warning to him to the contrary, supplies her necessities after her husband's refusal to receive her again upon her offer to return; although the wife were not furnished with the means of support by her husband; and although she had not committed adultery; *Manby v. Scott*, 1 Sid., 118. And it seems that in such case a notice not to trust the wife, need not be given, it being the duty of the tradesman, before he trusts a woman under such circumstances, to make inquiries. *Misen v. Pick*, 3 M. & W., 481.

So where in pursuance of a deed of separate maintenance, a wife quits her husband against his will, and continues to live apart from him, although he is willing and wishes to receive her back, and provide for her in his own house, it seems he is not liable even for necessities supplied to her. *Hindley v. Marquis of Westmeath*, 6 B. & C., 200.

Where it appeared that the defendant's wife having committed adultery, he separated himself from her, but left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; and she continued to reside in the house in a state of adultery; it was held that the husband was liable for necessities furnished to her in the house in which she was left with the children; it not appearing that the plaintiff knew, or might readily have known, the circumstances under which she was living. But Eyre, C. J., observed, "if the defendant in another action brought against him by some other tradesman, shall be able to establish the notoriety of his wife's situation, he may defend himself;" and Buller, J., remarked that the case was anomalous. *Norton v. Fagan*, 1 B. & P., 226.

Onus of proof.—Where the defendant is living with his wife or person to whom the goods were delivered, it will be sufficient for the plaintiff to prove (in addition to the order

for and delivery of the goods) either the fact of marriage, or that the woman and the defendant cohabited, and that she passed as his wife with his assent. This will be sufficient *prima facie* evidence of the defendant's liability, and it will be no defence, that the plaintiff knew her not to be his wife; *Watson v. Threlkeld*, 2 *Esp.*, 637; *Robinson v. Mahon*, 1 *Camp.*, 245. But this only applies while the woman assumes the defendant's name, lives in his house, and is part of his family. *Watson v. Threlkeld*, *supra*.

Where the defendant is separated from his wife, it lies upon the plaintiff to show not merely the marriage by the fact of marriage or by reputation, but, under the circumstances of the separation, or from the conduct of the husband, that he is *prima facie* liable; and this even in an action for necessaries; *Mainwaring v. Leslie, M. & M.*, 18; *Clifford v. Laton*, *ibid.*, 102, 3 *O. & P.*, 15. And in such cases, where the goods supplied are not necessaries, it is not for the husband to prove having given notice not to trust his wife, but for the plaintiff to show such a state of facts as to raise an inference that the wife contracted as the agent of the husband. *Spreadbury v. Chapman*, 8 *C. & P.*, 371.

After such proof has been adduced, it is incumbent on the husband, when sued for necessaries furnished to his wife during their separation, under an agreement for a separate maintenance, to prove the adequacy of the allowance and the due payment of it; and if it be inadequate, or not duly paid, he is liable; *Nurse v. Craig*, 2 *New R.*, 148. And if a husband, on separating from his wife, instead of granting her a continuing allowance, assign, by deed, certain property absolutely to trustees for her benefit; he must prove, when sued for necessaries supplied to her after their separation, that the trustees gave effect to the deed, by taking possession of the property. *Burrett v. Booty*, 8 *Taunt.*, 343.

On the other hand, the defendant may rebut any *prima facie* presumption of his liability, by proof that the credit was given to the wife; or by proof of any other circumstances negating the husband's assent, *see ante*, p. 123. In the case of necessaries supplied during cohabitation, he may shew an express notice to the plaintiff not to trust the wife, or a general or express notice where the goods are not necessaries.

Goods sold to wife before marriage.—The husband is liable jointly with the wife during the marriage upon all contracts made by her while she was single, how improvident soever they may be, and although he may have received no fortune with her. The husband cannot, however, be

sued alone on such contracts, but the wife must be joined in the action with him.

As to the liability of a wife to be sued as a single woman, *see ante*, p. 34; and as to the liability of an infant widow for the funeral expenses of her husband, *see Chapple v. Cooper*, 13 L. J., *Ex.* 286.

DELIVERY TO INFANT.

The father of an infant to whom goods are supplied is only liable where an actual authority from him to his son is proved, or circumstances appear from which such an authority can be implied, or there is a subsequent recognition of the claim; *Baker v. Keen*, 2 *Stack.*, 501; *Rolfe v. Abbott*, 6 C. & P., 286. It seems doubtful whether a father, deserting his infant child, be liable to a party who supplies the child with necessaries, no farther proof of contract being given. An action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for. *Urmston v. Newcomen*, 4 A. & E., 899.

It appeared that the plaintiff, a tailor, furnished clothes to the defendant's son, a boy at school; that the boy when sent to the school seemed in want of clothes; that when he went home for the holidays he took the clothes in question with him, but was not wearing them; and that he returned to school with them. Defendant lived a short distance from the place where the school was, but it did not appear that he had given any direction, or made any provision for supplying his son with clothes. It was held that, on this case, there was *some* evidence to go to a jury of an implied authority from the father to furnish the clothes; *Law v. Wilkin*, 6 A. & E., 718. So in an action against a parent for the price of regimentals furnished to his son, *Abbott, C. J.*, left it to the jury to consider whether they could infer that the order was given by the assent and with the authority of the father. He said that "a father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father who had an imprudent son, might be prejudiced to an indefinite extent; and it was therefore necessary that some proof should be given that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed

his son at the Military College at *Harlow*, and had paid his expenses whilst he remained there. His son, it appeared, then obtained a commission in the army; and having found his way to London, at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the *East Indies*. If it appeared in evidence that the defendant had supplied his son with money for the purpose, or that he had ordered these articles to be furnished elsewhere, either of those circumstances might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing, however, of this nature had been proved; and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say whether they were not satisfied that an authority had been given by the defendant." *Baker v. Keen*, 2 *Stack. R.*, 501.

Even the father of an illegitimate child is liable, upon an implied contract, to pay for necessaries supplied for the child, if he have adopted it by taking it to his home. *Hesketh v. Jowring*, 5 *Esp. R.*, 131.

EVIDENCE IN AN ACTION BY ADMINISTRATOR OR EXECUTOR
FOR GOODS SUPPLIED BY INTESTATE OR TESTATOR.

The County Courts Act, 9 & 10 Vict., c. 95, enacts that it shall be lawful for any executor or administrator to sue and be sued in any court holden under this Act in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in any superior court*.

Where an administrator or executor seeks to recover the amount of goods sold and delivered by the intestate or testator, he must, in addition to the proof necessary in an ordinary case of goods sold (*ante*, p. 3 to 28), prove his title to sue; that is to say, that he is administrator or executor, as the case may be.

Administration is proved by the production of the letters of administration, and no further evidence is necessary on

* If by this is meant that the executor or administrator may bring any action which his testator or intestate might have brought, this clause makes a serious alteration in the law; for, independently of this clause, there are many actions a man may bring in his own right which his executor or administrator cannot. See *Archbold's Practice of the New County Courts*, p. 72.

that point, as the seal of the Ecclesiastical Court proves itself.

The title of an executor is proved by production of the probate; and as in the case of administration, the seal of the Ecclesiastical Court or the probate proves itself. *Kempton v. Cross, Hardw.*, 108.

As the administrator or executor has in general the custody of the letters of administration or the probate of the will, there will seldom be any difficulty in producing the requisite proof. The letters of administration and probate are not, however, the only means of proof; for the Act book of the Ecclesiastical Court, or an examined copy, stating the grant of letters of administration to the plaintiff, or containing an entry of the will having been proved and of probate granted to the executors therein named, is proof of the party being administrator or executor, without notice to produce the letters of administration, or without accounting for the non-production of the probate. *Cox v. Allingham, Jacob*, 514.

An indorsement or note at the foot of the original will, by the surrogate and deputy-registrar, is primary evidence of probate, when no other record of it is kept; *Doe v. Mew*, 7 A. & E., 240; but the original will cannot in general be read in evidence to prove the title of the executor. *R. v. Barnes*, 1 Stack., 243; *Pinney v. Pinney*, 8 B. & C., 335.

If the probate is lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 Stra., 412.

It may be observed here, that an executor may in general sue in his representative character on a contract made with himself, when the money recovered would be assets; or he may sue as for a debt due to himself; *Cowell v. Watts*, 6 East, 406; *Heath v. Chilton*, 13 L. J., Ex. 225. The distinction affects the form of the plaint, and also the evidence to a certain extent; for where the plaintiff sues as executor he must prove his character and right to sue in that form.

Defence.—With regard to the cause of action, the evidence in defence will be the same as in an action between the defendant and the intestate or testator. *Roscoe*, 6th ed., p. 577. See *ante*, p. 29 to p. 107.

EVIDENCE FOR THE PLAINTIFF IN AN ACTION AGAINST ADMINISTRATOR OR EXECUTOR FOR GOODS SUPPLIED TO AN INTESTATE OR TESTATRIX.

In addition to the evidence of the sale and delivery of the goods to the deceased, as in other cases, the plaintiff must prove the representative character of the defendant; and also, it appears, give evidence of assets.

Proof that defendant is executor.—He may prove the representative character of the defendant by production of the probate or letters of administration (*see ante*, p. 131), or by secondary evidence of them, after a notice to produce served upon the defendant; in such case, as the presumption of law is that the probate or letters of administration are in the possession of the party who is alone entitled to them, it is not necessary to give any evidence in order to show that they are in the defendant's possession. When notice was given to the defendant to produce the probate of his testator, and the defendant was bound by a judge's order to admit an office copy of the will, it was held that on non-production of the probate, an official copy of the will, purporting to be signed by the registrar of the Ecclesiastical Court, and annexed to which was what purported to be a copy of the act of the Ecclesiastical Court, was admissible as secondary evidence, being a copy of an official act. *Waite v. Gale*, 14 L. J., Q. B., 212.

Some proof of the identity of the defendant with the person named as executor in the probate must be given. *Roscoe*, 6th edit., p. 579.

If a person who is neither executor nor administrator intermeddle with the goods of the deceased, or does any other act characteristic of the office of executor, he makes himself an executor of his own wrong, or, to use a more technical expression, an executor *de son tort*, and liable not only to an action by the rightful executor or administrator, but also to be sued by a creditor of the deceased. 1 *Williams' Executors*, 2nd edit., 148.

Executor de son tort.—Where the defendant is sued as executor *de son tort*, in consequence of having intermeddled with the effects of the deceased without having any title in fact either as executor or administrator, the plaintiff must of course give evidence of such acts as will in law make a man an executor *de son tort*, and where the defendant is in fact executor or administrator, but the plaintiff cannot give evidence of the probate or letters, it is sufficient to give evidence of such circumstances as will render the defendant liable as executor *de son tort*. *Roscoe*, 6th edit., p. 579.

What acts will make a man an *executor de son tort* is a question of law; but it is for the jury, if there be one, to say whether such acts are proved; *Padget v. Priest*, 2 T. R., 97. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case, merely taking a book, and in another a bedstead, was held sufficient; *Anon. Noy*, 69. So living in the house and carrying on the trade of the deceased, *Hooper v. Summersett*, Wightw., 16; demanding, suing for, receiving, or releasing the debts due to the estate; *Com. Dig. Administrator*, (c. 1); entering on a lease or term for years; using, or giving away, or selling of the goods, or if he takes the goods to satisfy his own debt or legacy. So where A, the servant of B, sold goods of C, an intestate, both before and after C's death, in pursuance of orders given by C in his lifetime, and paid the money arising from such sale into the hands of B, it was held that B was an *executor de son tort*; *Padget v. Priest*, 2 T. R., 97. And where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that the bill of sale was fraudulent against other creditors, and that he had thereby rendered himself *executor de son tort*; *Edwards v. Harben*, 2 T. R., 587. Merely looking up the goods of the deceased; directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle; repairing his houses, or providing necessaries for his children, or paying the deceased's debts out of the defendant's money,—will not render the party liable as *executor de son tort*; for they are merely offices of kindness and charity. *Williams on Executors*, P. 1, B. 3, ch. 5; *Roscoe*, 6th edit., p. 580.

Where the widow of a hairdresser continued in the house and shop after his death, without selling anything, and gave a promissory-note to a creditor of her husband, and afterwards took out administration; it was held that she could not be charged as *executrix de son tort*. *Serle v. Waterworth*, 4 M. & W., 9.

Proof of assets.—Very slight proof of assets will be sufficient unless contradicted by evidence on the part of the defendant.

Proof that certain articles of furniture were bought by the deceased and seen in his house shortly before his death, is *prima facie* evidence of assets. *Britton v. Jones*, 3 Bing., N. C., 676. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the Ecclesiastical Court; but a copy of the inventory,

signed by the appraisers and not by the executors, is not evidence. *B. N. P.*, 140. It is not every inventory that will be proof of assets: thus the inventory exhibited by an executor before probate, which he makes out without full examination of the property, and in which he is bound to include all the effects of the deceased, is not even *prima facie* evidence of assets. *Steam v. Mills*, 4 B. & Ad., 657.

When the assets consist of debts due to the deceased, it has been held that it is necessary to prove, presumptively at least, that these debts have been paid. *Giles v. Dyson*, 1 Stark., 32. See however, *B. N. P.*, 140; *Smith v. Davis*, Selw., N. P., 712.

Where to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that a sum of money had been awarded as due to the testator's estate, Lord Ellenborough held that this was not sufficient without shewing that it had been received by the executors. *Williams v. Innes*, 1 Camp., 364. If an executor submits to arbitration, such submission is not an admission of assets; the arbitrators not directing the executor to pay the money. *Pearson v. Henry*, 5 T. R., 6. But a submission to arbitration and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded. *Barry v. Rush*, 1 T. R., 691; *Worthington v. Barlow*, 7 T. R., 453. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, 12 East, 232. So the payment of interest upon a bond of the testator is not an admission of assets. *Clewerley v. Brett*, cited 5 T. R., 8. A probate stamp is *prima facie* evidence of assets; *Foster v. Blakelock*, 5 B. & C., 328; but it is doubtful whether it is evidence of the amount of assets. *Steam v. Mills*, 4 B. & Ad., 657; *Mann v. Long*, 3 A. & E., 699.

An administrator *bond fide* compounding with a debtor to the estate, is not liable to the full amount of the debt compounded, as he is where he releases it without consideration. *Pennington v. Healey*, 1 C. & M., 402.

Where leasehold premises are the assets, the value as between the lessor and the lessee's executor is to be taken exclusive of deterioration for want of repair, or other breach of covenant committed in the executor's time; and the insolvency of an under-tenant, let in by the testator, cannot be taken into consideration, at least where there is a clause of re-entry in the underlease for non-payment of rent. *Hornidge v. Wilson*, 11 A. & E., 645. *Roscoe*, 6th edit., p. 580.

EVIDENCE FOR THE DEFENDANT.

The administrator or executor may of course set up any defence to the claim of the plaintiff which the defendant might himself have set up if living.

As to such defences, *see ante*, p. 28 to p. 107.

Set-off.]—A defendant sued as executor or administrator, cannot set-off a debt due to him personally; but a debt due from the plaintiff to the testator in his life-time, may be set-off against a debt accruing to the plaintiff from the defendant as executor after the death of the testator. *Blakesley v. Smallwood*, 15 L. J., Q. B., 185.

Statute of Limitations.]—A promise by one executor will not take a case out of the Statute of Limitations as against his co-executor. *Tullock v. Dunn*, 1 R. & M., 416; *Scholey v. Walton*, 13 L. J., Ex., 122.

Payment of debts.]—The defendant, in answer to this action, may prove that the *assets* have been exhausted by payment of other debts of the deceased of as high, or, of a higher degree than the debt of the plaintiff: for the defendant is of course only liable to the extent of *assets* of the deceased in his hands, applicable to the debt sought to be recovered, in reference to its degree or quality.

The payment of assets must be by a due course of administration.

The course of distribution is as follows:—1. All funeral expenses, and the charges of proving the will, or of taking out letters of administration; and the defendant may shew that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them. *Gillies v. Smither*, 2 Stack., 528. 2. Debts due to the Crown by record or speciality. 3. Certain debts created by particular statutes. 4. Debts of record, if docketed according to statute 4 & 5 W. & M., c. 20; otherwise they only rank as simple contract debts. *Hickey v. Hayter*, 6 T. R., 384; *Hall v. Tapper*, 3 B. & Adol., 655. 5. Debts due by speciality, and rent. 6. Debts due by simple contract. *Williams' Executors*, P. 3, B. 2, ch. 2.

The expenses of the funeral, if reasonable and suited to the rank and circumstances of the deceased, will be allowed out of the assets; if unreasonable, the executor must take his chance of the estate turning out insolvent. *Edwards v. Edwards*, 2 C. & M., 612. And he will be liable to reasonable expenses, even although he did not actually order the funeral, provided the credit was not given to another; and if he has authorized unreasonable expenses, he is liable

personally, and not merely as executor; *Brice v. Wilson*, 8 A. & E., 349 (n); and an administrator is liable as such even where he has sanctioned them before he took out administration. *Lucy v. Walrond*, 3 Bing., N. C., 841.

An executor *de son tort* may pay a specialty debt after action brought by a simple contract creditor, and may prove the payment of that debt in bar of the action. *Owenham v. Clapp*, 2 B. & Ad., 309.

When the defendant relies upon the payment of bonds of the deceased, it will be sufficient, it is said, to prove the payment without proving the bond; *B. N. P.*, 143; for although no bond existed, the payment of any debt would be a good answer to an action on simple contract as for goods sold; but where the action is brought on a bond of the deceased, and the defendant relies on the payment of other bonds, the execution of such bonds must be proved in the usual manner, even though the bonds have been destroyed. *Gillies v. Smither*, 2 Stack., 530; *See Poole v. Warren*, 8 A. & E., 582.

Though a creditor may so mislead an executor as to preclude himself from objecting to the course of administration, yet a letter written to the latter intimating an intention to hold him liable personally and not as executor, is insufficient for this purpose. *Richards v. Browne*, 3 Bing., N. C., 493.

Outstanding debts.]—An administrator or executor may shew that there are outstanding debts of a higher nature than the one sued for. This defence differs therefore from the one just considered, inasmuch as actual payment of debts of an equal degree is a good answer to the proof of assets; but if the debt has not been actually paid, but is simply due, it must be of a higher nature than the one sued for, to be a good answer. For example, in answer to the action for goods sold and delivered, the administrator or executor cannot say that there are other unsatisfied claims for goods sold, or on any other simple contracts, which will take all the assets. The unsatisfied claims must be specialty debts, as bonds, judgments, &c.

An executor may confess a judgment to a creditor in equal degree with the plaintiff pending the action, and plead it in bar; and though done for the express purpose of depriving the plaintiff of the debt, it is good both at law and in equity. 2 *Saund.*, 51 (n); *Pickstock v. Lyster*, 3 M. & S., 375.

Retainer.]—The defendant, if a rightful executor, may shew a retainer of the assets to satisfy a debt due to himself. It must, however, be a debt of an unequal or higher

degree than the debt for which the action is brought, in order to entitle the defendant to retain it. So the defendant may retain for payments which he has made out of his own monies before the entering of the plaint, in discharge of debts of the deceased of equal or higher degree than the plaintiff's. *C. Litt.*, 283 a; *B. N. P.*, 141.

One of two executors may retain for his own debt out of a balance due from both to the estate. *Kent v. Pickering*, 2 *Keene*.

An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor after action brought has consented to the retainer. *Curtis v. Vernon*, 3 *T. R.*, 587. *S. C. in Error*, 2 *H. Bl.*, 18.

Evidence in answer to proof that defendant is executor de son tort.]—In answer to the evidence adduced to prove him executor *de son tort*, the defendant may shew that he took possession of the intestate's goods under a fair claim of right; *Fennings v. Jarrat*, 1 *Esp.*, 355; *Com. Dig. Administrator* (C. 2); or that he acted under the authority of the rightful administrator; but it is no defence that he acted as the agent of one named executor, who has never proved the will; *Cotile v. Aldrich*, 4 *M. & S.*, 175. It is doubted whether there can be an executor *de son tort* while there is a lawful executor in being. *Hall v. Elliot, Peake Ca.*, 87; *Read's case*, 5 *Co.*, 34 a. *Roscoe 6th edit.*, p. 580.

To defence of payment of debts.]—Where the defendant shews payment of debts to the amount of the assets, the plaintiff may shew that the payment was made out of another fund applicable to such debts, and not out of the assets. *Marston v. Downes*, 1 *A. & E.*, 31.

To defence of outstanding debts.]—Where the defendant shews an outstanding judgment, the plaintiff may answer that it was obtained or kept on foot by fraud, and give in evidence that the debt was not a just one, or that less is due than the sum for which judgment has been given; 2 *Saund.*, 50 (n). In answer to the latter evidence, which is *prima facie* proof of fraud, the defendant may show that the judgment was entered for more than was due by mistake; *Pease v. Naylor*, 5 *T. R.*, 80. If it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shewn that the administrator had not assets to pay that sum, it is no fraud; *Per Cur. Parker v. Atfield*, 1 *Salk.*, 312. If the defendant sets up several judgments recovered *against himself*, to which the plaintiff replies fraud, it will entitle the plaintiff to a general judgment if he can avoid any one of them; for a judgment recovered against an executor being an admis-

sion of assets, if any one of the judgments be falsified, the defendant admits by setting up all the judgments that he has more assets than will satisfy the other judgments, by as much as the judgment, so falsified, amounts to. 1 *Saund.*, 337 a (n). See *Chamberlaine v. Pickering*, 1 *Freeman*, 28; *Gilbert v. Dee*, *ib.*, 537. In an action in the County Court, however, where the parties are not tied down to any particular line of defence by previous pleadings, the defendant might probably be allowed to show the exact amount of assets so as to limit his liability, notwithstanding he set up a judgment which the plaintiff falsifies, although, in strictness, even in the County Court he could not do so of right, as he ought to establish his defence at once, whatever it may be, and setting up a judgment and then calling evidence to show that he had no assets to meet it, is a contradictory defence.

To defence of retainer.]—In answer to the evidence of retainer by an executor *de son tort*, the plaintiff may show who are the rightful executors. *B. N. P.*, 143.

Promise by executor or administrator.]—In answer to the defence of *no assets*, or *retainer*, &c., the plaintiff may sometimes prove a promise by the defendant to pay the debt sued for. No action can however be brought whereby to charge an executor or administrator upon any special promise to answer damages out of his own estate; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized; 29 *Car. II.* c. 3, s. 4. In order to render an executor, &c., personally responsible for the demand against the testator, it is essential not only that the promise of the representative should be in writing and signed, but that there should exist some new and sufficient consideration for the engagement; as the forbearance to proceed against the defendant, &c. The mere possession of assets seems not to be a sufficient consideration to charge the executor *personally* on his promise. It is said that the creditor's proof to the executor of the delivery of goods to the testator, is a sufficient consideration for this purpose. And it seems that the consideration for the promise must appear on the face of the memorandum. *Chitty on Contracts*, 3rd edit.

Although such a promise is mentioned here as in answer to the defence of want of assets, &c., the plaintiff when he relies upon such promise, should prove it in the first instance as part of his case. Proof of the promise, however, will not dispense with the necessity of proving that the

defendant is executor or administrator, for that forms part of the consideration for the promise; but the plaintiff need not show that the defendant had assets.

The promise of an executor to pay a debt "whenever sufficient effects are received from the estate of the deceased," must be understood to mean sufficient effects in the ordinary course of administration. *Bowerbank v. Monteiro*, 4 Taunt., 844.

As to actions to recover the amount of a legacy or distributive share, see *post*, *Actions relating to Money*.

ACTIONS BY ASSIGNEES OF BANKRUPTS.

In an action brought by the assignees of a bankrupt upon contracts made between the bankrupt and the defendant (as for goods sold by the former), the assignees in addition to the proof of the contract, as in other cases, must prove their right to maintain the action.

The 6 Geo. IV., c. 16, sec. 63, and 1 & 2 Will. IV., c. 56, sec. 25, vest the bankrupt's property in the assignees; see *ante* p. 102. As to evidence of proceedings in bankruptcies in general, see 2 & 3 Will. IV., c. 114, s. 9, *ante* p. 97.

By 5 & 6 Vict., c. 123, s. 24, if the bankrupt shall not (if he was within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe at the same date), within three months after such advertisement, or (if elsewhere at the same date), within twelve months after such advertisement have commenced an action, suit, or other proceeding, to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit, had he not been adjudged bankrupt, that such person became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date.

The 1 & 2 Will. IV., c. 56, s. 17, authorising the bankrupt to dispute the adjudication by petition to the Court of Review, which may grant an issue for trying the validity of the adjudication; enacts that if the verdict or adjudication shall not be set aside, such verdict or adjudication shall as against the bankrupt, the petitioning creditor, and any assignee, and all persons indebted to the bankrupt's estate,

be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication.

By 10 & 11 Vict., c. 102, the Court of Review is abolished, and its jurisdiction and powers transferred to one of the vice-chancellors.

The appointment of the assignees is proved by the production of the appointment, or other instrument, or a copy sealed with the seal of the Court of Bankruptcy, which is evidence without further proof, 1 & 2 Will. IV., c. 56, sec. 29; 2 & 3 Will. IV., c. 114, s. 9; *ante*, p. 97.

The 6 Geo. IV., c. 16, s. 90, enacts, that in any action by or against any assignee, no proof shall be required at the trial, of the petitioning creditor's debt, or of the trading, or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, or other person, that he intends to dispute some, and which of such matters; and in case such notice shall have been given, the judge may (if he thinks fit) certify that the matter has been proved or admitted, which shall entitle the party to costs.

Although this section is not strictly applicable to actions in the County Courts, the judges of those Courts would probably apply the spirit of it to proceedings in their Courts, and where no notice had been given, either refuse to allow the defendant to dispute the above points, or adjourn the case, to enable the plaintiffs to supply the evidence, and saddle the defendant with the costs incident to the postponement.

In regard to the evidence of the petitioning creditor's debt, the 6 Geo. IV., c. 16, s. 92, provides, that if the bankrupt shall not have given notice within a certain time of the adjudication, of his intention to dispute his bankruptcy, or proceeded therein with due diligence, the depositions taken before the commissioners, at the time of, or previous to the adjudication, of the petitioning creditor's debt, the trading and act of bankruptcy shall be conclusive evidence of the matters therein respectively contained in all actions at law, or suits in equity, brought by the assignees for any debt or demand, for which the bankrupt might have sustained any action.

If the bankrupt had not disputed his bankruptcy, or disputed and failed, then the *Gazette* or verdict appears to be conclusive evidence that he was a bankrupt at the date of such adjudication. See 5 & 6 Vict., c. 122, s. 24; 1 & 2 Will. IV., c. 56, s. 17; *ante*, p. 140.

In the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy,

under any fiat in bankruptcy, already issued or hereafter to be issued, the deposition of any such deceased witness, purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein respectively contained; 5 & 6 Vict., c. 122, s. 25.

Defence.—The defendant may of course avail himself of any defence applicable to an action brought by the bankrupt. As to such defences, see *ante*, p. 29 to p. 107.

Set-off.—In regard to *set-off* (*ante*, p. 72), the 6 Geo. IV., c. 16, s. 16, enacts, that where there has been mutual credit or mutual debts between the bankrupt and another, one debt or demand may be set against the other, notwithstanding a prior act of bankruptcy; and the balance alone shall be claimed or paid; and every debt or demand provable against the estate may be set-off against it, provided the person claiming the set-off had not, when credit was given, notice of an act of bankruptcy committed.

The term mutual *credit* is held to have a more extensive meaning than mutual *debt*, but it is now settled that the term is confined to such credits only as must, in their nature, terminate in debts; as where a debt is due by one party, and credit is given him on the other side for a sum of money, payable on a future day, and which will then become a debt; or where there is a delivery of property on one side, with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute, will, in all respects be complied with; see *Bittleston v. Timmis*, 14 L. J., C. P., 117, but where there is a mere deposit of property, without any authority to turn it into money, no debt can arise out of it, and therefore it is not a credit, within the meaning of the statute. *Rose v. Hart*, 8 Taunt., 499. *Gibson v. Bell*, 1 Bing., N. C. 748.

An unsigned statement of account between the bankrupt and defendant, sent to the defendant by an accountant employed by the assignees, in which account a balance in favour of the defendant is stated, is not a sufficient acknowledgment of a debt set-off by the defendant, so as to take it out of the Statute of Limitations as against the assignees, and a statement by a bankrupt in his balance-sheet, of a debt due by him is not evidence as against his assignees of the debt being due. *Pott v. Cleg*, 16 L. J., Ex., 210.

Although the assignees bring their action, and frame their plaint on a cause of action accruing to them as assignees, the defendant may set-off debts due to him by the bankrupt before he had notice of any act of bankruptcy,

Buttleston v. Timmis, 14 L. J., C. P., 117; *Hulme v. Mugleston*, 3 M. & W., 30. Thus, in an action for goods sold and delivered by the plaintiff as assignee, and the defendant had given notice of set-off, it was held that the defendant was entitled to give in evidence a debt due from the bankrupt before any act of bankruptcy, the sale of the goods for which the action was brought having been in fact made by the bankrupt after an act of bankruptcy, but more than two months before the date of the commission. *Southwood v. Taylor*, 1 B. & Ald., 471.

ACTIONS BY ASSIGNEES OF INSOLVENTS.

The 1 & 2 Vict., c. 110, vests all the real and personal estate and effects, (except as therein mentioned), and all the future estate, right, title, interest, and trust, in or to any real or personal estate and effects of an insolvent upon the filing of his petition, in the provisional assignee of the Court who, until the appointment of other assignees, has power to sue in his own name, if the Court shall so order, for the recovering of debts due to the insolvent, sec. 37, 42; and by sec. 75 upon the appointment of an assignee by the Court, the property is vested in him in the place of the provisional assignee.

By section 51, the assignees appointed by the Court are empowered to sue from time to time, as there may be occasion, in their own names, for the recovering, obtaining, and enforcing of any estate, effects, or rights of the insolvent.

Section 105, enacts, "that a copy of the petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said Court, shall at all times be admitted in all courts and places whatever as sufficient evidence of the same, without any other proof whatever given of the same."

The statute (1 & 2 Vict., c. 110), containing the preceding section, has occasioned some litigation by enacting in a previous clause (sec. 46), that a copy of any vesting order, or of any appointment of assignees, "such copy being *made upon parchment*, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy *appointed for that purpose*, indorsed thereon, and to be sealed with the seal of the said Court," shall be received as sufficient evidence of such order and appointment respectively

having been made, and of the title of the provisional assignee, and of the other assignees respectively under the same. This language raised two questions, first, whether a certified copy on *paper* of a vesting order could be received; and, secondly, whether in the event of its being signed by a deputy, his appointment for the particular purpose of making out copies, must either be stated on the document, or proved in evidence. It has been determined that a paper copy is admissible, *Hounsfield v. Drury*, 11 *A. & E.*, 98; and that the *special* appointment of a deputy need neither be stated nor proved; *Jackson v. Thomson*, 2 *Q. B.*, 887; apparently, on the ground that the 48th section is rendered nugatory by the 105th. *Taylor's Treatise on Evidence*, p. 1030.

The 5 & 6 Vict., c. 116, amended by the 7 & 8 Vict., c. 96, (see *ante*, p. 100), enacts (sec. 7) that after the passing of the final order under that Act, the official assignee, and the creditor's assignee, shall hold all the estate, effects, and credits of the petitioner "as fully as if the petitioner had been made a bankrupt, and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat;" and sec. 11, enacts, "that the like evidence of the appointments of assignees shall be received as sufficient to prove such appointments in all courts and places whatsoever, as is received by the laws now in force relating to bankrupts, to prove such appointments."

The amending Act, 7 & 8 Vict., c. 96, empowers (sec. 13) the assignee or assignees, as the case may be, to sue, from time to time as there may be occasion, in his or their own name or names for the recovery of the property, or rights of the petitioner; and sec. 37, enacts, "that any petition for protection from process, and any proceeding in the matter of such petition, purporting to be signed by a commissioner of the Court of Bankruptcy, or a copy of such petition, or other proceeding purporting to be so signed, shall in all cases be receivable in evidence of such proceedings having respectively taken place."

Under the former, as well as under the latter Act, the official assignee has power immediately on his appointment, and until the final order, to sue for a debt due to the insolvent. *Sayer v. Dufaur*, 17 *L. J.*, *Q. B.*, 50.

The jurisdiction and powers of the Court of Bankruptcy, and the District Courts of Bankruptcy, under the above statutes of the 5 & 6, and 7 & 8 Vict., being transferred by 10 & 11 Vict., c. 102, to, and vested in the Insolvent Court and in the County Court, it may be important to refer to the 9 & 10 Vict., c. 95, establishing the County Courts; section

111 of which, enacts, that the entries in the book of proceedings to be kept by the clerk of the Court, or a copy thereof bearing the seal of the Court, and purporting to be signed and certified as a true copy by the clerk of the Court, shall at all times be admitted in all Courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof.

EVIDENCE IN ACTIONS RELATING TO GOODS BARGAINED AND SOLD.

- § 1. *In an action for the price of goods bargained and sold.*
 - § 2. *In an action by the vendor for damages for not accepting goods.*
 - § 3. *In an action by the vendee for not delivering goods.*
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EVIDENCE FOR THE PLAINTIFF IN AN ACTION FOR THE PRICE OF GOODS BARGAINED AND SOLD.

In transactions relating to the sale of goods, it not unfrequently happens, that the nature of the agreement between the parties is such as to render an actual *delivery* of the goods by the plaintiff unnecessary or impracticable, or that the defendant by his conduct precludes the delivery. According to the particular circumstances of each case, the vendor of the goods when he has performed his part of the contract, or done all in his power to do so, can maintain an action for the price of the goods sold, and recover the full amount, or must frame his plaint against the defendant for not accepting the goods, and paying for them, in which action the plaintiff will be entitled to recover the difference between the contract price and the market price, on the day the contract was broken. The latter must be the form of plaint and action, where there is not an actual sale of the goods, so as to vest them in the defendant, an essential requisite in an action for goods bargained and sold.

In an action for the price of goods bargained and sold the plaintiff must prove the contract; the performance of all conditions precedent on his part; the breach by the defendant; and the price or value of the goods.

Proof of contract.—The plaintiff, to support this action, must prove such a contract of sale, made by him to the defendant, and completed, as was sufficient in law to vest

in the defendant the property in the goods, *per Tindal, C.J., in Elliott v. Pybus*, 10 *Bing.*, 512, 516; and confer on him a right to maintain an action of trover for them even against the plaintiff himself upon tendering the price; *Per Brougham and Parke, in Atkinson v. Bell*, 8 *B. & C.*, 278; see *Scott v. England*, 14 *L. J. Q. B.*, 43; *Lamond v. Devall*, 16 *L. J. Q. B.*, 136. The contract must appear to be for a specific article or articles, and not such as could be satisfied by the delivery of any other article of the like description. A specific price must be agreed upon; *Archbold's Nisi Prius*, vol. i, 2nd edit., p. 236. If the contract be for an article to be manufactured, it will not be sufficient that the maker appropriated it to the vendee, but the vendee's assent to such appropriation must also be proved; therefore where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold, if there be no appropriation of the particular machine assented to by the buyer; *Atkinson v. Bell*, 8 *B. & C.*, 277. The action should be for not accepting the goods.

The plaintiffs in London sold to the defendants a quantity of butter which they expected from Sligo; the quality and price were specified in the contract. The butter was not shipped till November; but the defendants waived the objection and accepted the invoice and bill of lading. The butter having been lost by shipwreck, it was held that the property had passed to the defendants, and that they might be sued in action for goods bargained and sold, or, *per Park, J.*, for goods sold and delivered; *Alexander v. Gardner*, 1 *Bing. N. C.*, 671.

Statute of Frauds.]—If the sale be within the meaning of the seventeenth section of the Statute of Frauds, and of the price of 10*l.* or upwards, the requisites of the statute must be proved.

By the seventeenth section of the Statute of Frauds, 29 Car. II., c. 3, no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

By Lord Tenterden's Act, 9 Geo. IV., c. 14, s. 7, it is enacted that the above provision of the Statute of Frauds "shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the

goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

As we are now considering the action relating to goods bargained and sold but not delivered, the question whether or not then there has been a sufficient acceptance and receipt to satisfy the Act does not arise here, but has been considered in treating of the action for goods sold and delivered; *ante* p. 5.

This however will be the proper place to consider whether, there being no acceptance and receipt, the buyer has given "something in earnest to bind the bargain or in part of payment," or whether there is "some note or memorandum in writing of the bargain made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

"Of the price of 10*l*."—Where several articles are bought at a shop at the same time, but at different prices, each under 10*l*. but amounting altogether to 70*l*., it has been held to be one contract and within the statute. *Baldry v. Parker*, 2 B. & C., 37.

Earnest or part payment.—Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the vendor, and returns the money into his own pocket, are not equivalent to earnest, or part payment within the statute; *Blenkinsop v. Clayton*, 7 Taunt., 597; and where the plaintiff being indebted to the defendant in 4*l*. it was verbally agreed between them that the plaintiff should sell to the defendant by sample certain goods, above the value of 10*l*., and that the 4*l*., should go in part payment; and the goods were delivered, but refused acceptance, it was held that the contract was void under the statute; but it seems that if there had been an express agreement that the plaintiff should pay to the defendant the 4*l*., and take it back as earnest or part payment, the statute would have been satisfied, without proof that the money actually passed. *Walker v. Nussey*, 16 L. J. Ex., 120.

Note or memorandum in writing of the bargain.—The word *bargain* used in the statute means the terms upon which the parties contract; *Kenworthy v. Schofield*, 2 B. & C., 947. The law with regard to the statement of the price in the contract appears to be this: that where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price may be presumed, and the contract may be so stated; *Hoadly v.*

M'Laine, 10 *Bing.*, 482; but where the contract is silent as to price, and it appears by the evidence that a specific price was agreed upon, the contract is imperfect, and cannot be given in evidence; *S. C. ib.*, 489. *Elmore v. Kingscote*, 5 *B. & C.*, 583. "We agree to give Mr. E., 1s. 7d. per pound for thirty bales of Smyrna cotton, customary allowance, cash 3 per cent., as soon as our certificate is complete," duly signed, has been held a sufficient memorandum. *Egerton v. Matthews*, 6 *East.*, 307. See *Cooper v. Smith*, 15 *East.*, 103; *Richards v. Porter*, 6 *B. & C.*, 437.

The terms of the contract cannot be varied by parol; *Marshall v. Lynn*, 6 *M. & W.*, 109; *Stead v. Dauber*, 10 *A. & E.*, 57; *Stowell v. Robinson*, 3 *Bing.*, *N. C.*, 928.

Where the price is ambiguous; as where hops are sold "at 100s.," this may be explained to mean 5*l.* per cwt.; *Spicer v. Cooper*, 1 *Q. B.*, 424, see *ante* p. 19.

The written memorandum must be made before action brought. *Bill v. Bament*, 9 *M. & W.*, 36. *Roscoe*, 6th edit., p. 264.

"*Made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.*"—A signature by initials is not enough. *Jacob v. Kirk*, 2 *M. & Rob.*, 221; *Sweet v. Lee*, 3 *M. & G.*, 452. A printed name is sufficient; *Saunderson v. Jackson*, 2 *B. & P.*, 238; if recognized by, or brought home to the party, as having been printed by his authority; *Schneider v. Norris*, 2 *M. & S.*, 288; and it is immaterial in what part of the agreement the name is signed. *Ibid.* *Johnson v. Dodgson*, 2 *M. & W.*, 653; *Knight v. Crockford*, 1 *Esp.*, 190. But whether the writing of his name by the defendant in the body of the instrument, for a particular purpose, be a sufficient signing, appears to be doubtful. *Stokes v. Moore*, 1 *Cox*, 219. 1 *P. Wms.*, 771. A signing as witness has been held sufficient, if the party signing is cognisant of the contents of the instrument. *Welford v. Beazely*, 3 *Att.*, 503. *Harding v. Crethorn*, 1 *Esp.*, 58. But see *Gosbell v. Archer*, 2 *A. & E.*, 500. It seems that a copy taken by a machine of a sold note made by an agent is not a sufficient signature by the agent to satisfy the statute. *Pitts v. Beckett*, 14 *L. J. Ex.*, 358.

The statute requires the agreement to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is good as against him though only signed by the party to be charged, and not by the other party; *Saunderson v. Jackson*, 2 *B. & P.*, 238; *Laythoarp v. Bryant*, 2 *Bing.*, *N. C.*, 735. *Roscoe*, 6th edit., p. 190.

Signature by agent.—A sale by auction is within the statute, and the auctioneer is the agent for both the vendor and vendee; *Kenworthy v. Schofield*, 2 B. & C., 947.

Where an auctioneer writes down the buyer's name, or that of his agent, in the catalogue to which the conditions of sale are annexed opposite the lot, together with the price bid, it seems a sufficient memorandum; *Phillimore v. Barry*, 1 Camp., 513. But where the conditions of sale are not annexed to, or referred to, in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute; *Hinde v. Whitehouse*, 7 East, 558. Whether an auctioneer be the agent of both the purchaser and seller depends upon the facts of the particular case. Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer; it was held that he was not bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of the sale and the rest on delivery. *Bartlett v. Purnell*, 4 A. & E., 792. *Roscoe*, 6th edit., p. 265.

The agent must be a third person, and not one of the principals; *Wright v. Dannah*, 2 Camp., 203; therefore if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer will not be sufficient to satisfy the statute; *Farebrother v. Simmons*, 5 B. & A., 333. But the signature by the auctioneer's clerk was held to be sufficient in an action by the auctioneer, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in a book. *Bird v. Boulter*, 4 B. & Ad., 443.

A broker is the agent of both parties, and may bind them by signing the same contract on behalf of the buyer and seller. Where bought and sold notes have been delivered by the broker to the parties, those notes are the proper evidence of the contract; *Thornton v. Meux*, M. & M., 43; *Trueman v. Loder*, 11 A. & E., 589; and such notes are admissible, though the entry in the broker's book has never been signed by him; *Groom v. Aftalo*, 6 B. & C., 117. If the bought and sold notes materially differ there will be no valid contract; *Grant v. Fletcher*, 5 B. & C., 436; *Thornton v. Meux*, M. & M., 43. A broker gave the following bought and sold notes: 1. "We have this day bought for your use from I. O. B. 100 tons dry palm oil at 31*l.* 10*s.* per ton, to be taken from the quay at landing

weights with customary allowances, &c., in cash at fourteen days from delivery, less two and a half per cent. discount, to be delivered from the Speedy or Charlotte expected to arrive about November or December next." 2. "We have this day sold for your use, payment in fourteen days by cash, less two and a half per cent. discount from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, ex Speedy and Charlotte to arrive." It was held that evidence of mercantile usage was admissible to explain all the variances between these notes, and that being so explained, the variances were not material and did not avoid the contract. *Bold v. Rayner*, 1 *M. & W.*, 343.

Where the sold note was in the name of an agent, it may be shown by parol on behalf of the plaintiff, that in all previous transactions with the plaintiff, the defendant had contracted in the agent's name. *Trueman v. Loder*, 11 *A. & E.*, 589.

If no bought and sold notes have been made out, the entry in the broker's book, signed by him, will be evidence of the contract; *Grant v. Fletcher*, 5 *B. & C.*, 436; *Henderson v. Barnswell*, 1 *Y. & J.*, 387. And where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, may be evidence of the contract; *Semb. Thornton v. Charles*, 9 *M. & W.*, 802; and see the observations of Parke B. in that case. Where the broker, in the bought and sold notes, described the seller's firm as A, B, and C; but the firm had in fact, unknown to the broker, been changed to A, D, and E, it was held that A, D, and E, might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs; *Mitchell v. Lapage*, *Holt, N. P. C.*, 253. A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, will preclude the seller from recovering; *Powell v. Divett*, 15 *East*, 29. *Roscoe*, 6th edit., pp. 265, 266. Thus where the defendant bought of the plaintiff a quantity of wool, it being agreed between them in the presence of a broker, that the wool was to be delivered in good dry condition. On the same day the broker sent a sold note signed by him, to the plaintiff, no copy of which was communicated to the defendant, but in which he omitted the stipulation as to the condition of the wool, and the wool delivered to the defendant was not in good dry condition; it was held that he was not liable, there being no note in writing within the Statute of Frauds, as the broker was not his agent to make

the contract in question, but merely to sell them wool in a good dry condition. *Pitts v. Beckett*, 14 L. J. Ex., 358.

With regard to the person authorized by the party to sign, it is settled that such person need not be authorized in writing. *Coles v. Trecothick*, 9 Ves., 250. *Acebal v. Levy*, 10 Bing., 378.

A subsequent recognition of the authority of the agent by the principal is sufficient; therefore, if A, without authority, makes a contract in writing for the purchase of goods by B, and B subsequently ratifies the contract, such ratification renders the act of A valid as an agent within the Statute of Frauds. *Maclean v. Dunn*, 4 Bing., 722. *Gosbell v. Archer*, 2 A. & E., 500.

The memorandum or agreement, as it relates to the sale of goods, does not require a stamp.

Performance of conditions precedent.—Everything must be done, such as weighing or measuring or the like, which is necessary to the specific appropriation of the goods to the defendant; see *Simmons v. Swift*, 5 B. & C., 857. It must appear also that the vendor has the goods ready to deliver, upon the recovery of the price; *Hoare v. Milner, Peake*, 42 A.C. And where it is the duty of the plaintiff to tender the goods to the defendant such tender must be proved. A tender of, or being ready and willing to deliver, a larger quantity is not sufficient; at least unless it appear that the defendant might have had, and that the plaintiff was ready to deliver, the smaller quantity, which the defendant was really bound to take; *Dixon v. Fletcher*, 3 M. & W., 146. But where, by the terms of the contract, it is incumbent on the purchaser to fetch away goods, the proof of a tender seems to be unnecessary; and it will be sufficient for the plaintiff to show a readiness to deliver. *Rawson v. Johnson*, 1 East, 203; *Wilks v. Atkinson*, 1 Marsh, 412.

If all the before mentioned essential facts can be proved, the action for goods bargained and sold is a convenient form of action, in which to recover the price of goods that the vendor does not wish actually to deliver until such price has been paid, see *Kymer v. Sumercropp*, 1 Camp., 106, or of goods which the vendee has refused to receive; see *Hankey v. Smith, Peake*, 42 N; but if all this cannot be proved, the plaintiff instead of adopting this form of action should frame his plaint against the defendant for not accepting the goods and paying for them; see *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 236.

EVIDENCE FOR THE DEFENDANT.

The defendant may deny that he bought any goods of the plaintiff, or that he bought the goods in question, or that he bought them at the price specified. The latter goes merely in reduction of damages, but the two former are defences to the action.

If goods be ordered of a manufacturer of a certain quality, or for a particular purpose, and he makes them of a different quality, or so that they will not answer the intended purpose, the party who ordered them may refuse to take the goods; see *Street v. Blay*, 2 B. & Adol., 456; and this will be a good defence to an action by the manufacturer, whether the plaint is framed as for goods bargained and sold, or for not accepting the goods; see *Sieeking v. Dutton*, 15 L. J., C. P., 276. So, if a man sell goods by sample, and afterwards upon comparing the bulk with the sample, they are found inferior to it, the buyer may refuse to take the goods, and may set up this as a defence; *Hibbert v. Shee*, 1 Camp., 113; *Sieeking v. Dutton*, *supra*. But if goods be sold by a written contract, which contains a description of their quality, without referring to any sample, the vendor will not be allowed to prove that they in fact agree with a sample that was exhibited at the time of the sale to the vendee, who was a good judge of the article; *Tye v. Finmore*, 3 Camp., 462; nor will the vendee be allowed to prove that they are inferior in quality to the sample then exhibited; *Meyer v. Everth*, 4 Camp., 22; and see *Kain v. Old*, 2 B. & C., 627; *Pickering v. Dawson*, 4 Taunt., 779; *Archbold, Nisi Prius*, vol. 1, p. 236, 2nd edit. The defendant may show that the goods were furnished under a special contract, with a condition annexed, which the goods delivered did not satisfy; *Grounsell v. Lamb*, 1 M. & W., 352. Though the vendee of a specific chattel delivered with a warranty may not have a right to return it (see *Parsons v. Sexton*, 16 L. J., C. P., 181, and *post*, actions for breach of warranty), the same reason does not apply to the case of executory contracts; where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent is never completely accepted by the person ordering it, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial; *Okell, v. Smith*, 1 Stark, 107. Under a contract to purchase 300 tons of Campeachy logwood, at £35 per ton, to be of real merchantable quality (such as

might be determined to be otherwise by impartial judges to be rejected), it was held that the vendee was bound to take so much of the wood tendered as turned out to be of the sort described at the contract price, though it appeared at the time, that a part, afterwards ascertained to be sixteen tons, was of a different and inferior description; *Graham v. Jackson*, 14 *East*, 498. The purchaser by sample has a right to inspect the whole in bulk at any proper and convenient time, and, if the seller refuses to show it, may rescind the contract; *Lorymer v. Smith*, 1 *B. & C.*, 1; see *Parker v. Palmer*, 4 *B. & A.*, 387; *Roscoe*, 6th edit., p. 267, 268; and where goods have been sent on a contract for sale, and do not correspond with the sample contracted for, it seems the mere unpacking of them by the vendee will not render him liable, but otherwise if the goods were kept an unreasonable time; *Curtis v. Pugh*, 16 *L. J.*, 199, see *ante* p. 6.

If a man buy several articles at one entire price, and some of them answer the description in the contract, others not, he shall not be obliged to accept those which answer it, but may refuse to receive them altogether; and the same, it seems, if they have been purchased at distinct prices; *Champion v. Short*, 1 *Camp.* 53; and see *Baldey v. Parker*, 2 *B. & C.*, 37; and where an order for a specific quantity is given, and the order is exceeded, and a larger quantity is delivered, the vendee may return the whole. Thus where the defendant having ordered of the plaintiff two dozen of port, and the same quantity of sherry, to be returned if not approved of, the plaintiff sent him four dozen of each, and the defendant returned all but thirteen bottles, objecting to the quality; it was held that more wine having been sent than was ordered, the defendant was entitled to return the whole; and having kept part was only bound to pay for that part, as upon a new implied contract; *Hart v. Mills*, 15 *L. J.*, *Ex.*, 200. And where goods are sold "about" a certain quantity "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept more; thus on a bargain "for about 300 tons, more or less," the purchaser is not bound to accept 350 tons, at least unless it be shewn that a large excess was contemplated. *Cross v. Elgin*, 2 *B. & Ad.*, 106.

The defendant may show that the case is [within the Statute of Frauds, and that the requisitions of that Act have not been complied with; or that where there was a written contract, that it has been altered, for an alteration in a material part without the consent of both parties, is a

material alteration which avoids the contract, although it may not have altered the duty of the party sought to be charged. *Mollett v. Wackerbaith*, 17 L. J., C. P., 47.

As to defences in general, *see ante* p. 29, to 107.

ACTION AGAINST PURCHASER FOR NOT ACCEPTING GOODS BARGAINED AND SOLD.

In an action for not accepting goods sold, the plaintiff must prove the contract and breach, the performance of all conditions precedent on his part, and the amount of damage. *Roscoe*, 6th edit., p. 263.

The distinction in the superior courts between this action and an action for the price of goods bargained and sold, is often merely in the framing of the *declaration*, and consequently in the County Courts, is as often confined to the *plaint*. Where the *plaint* is for goods bargained and sold, instead of for not accepting goods, the judge would, no doubt, allow an amendment.

The evidence for the plaintiff and defendant will therefore be much the same as in the action for the price of goods bargained and sold. The plaintiff, however, is not obliged in this form of action to prove the sale of a specific article, and therefore this is the proper mode of framing the *plaint* where goods have been ordered to be made for the defendant, and the property therein has not been vested in him by any act subsequent to the completion of the order, such as assenting to an appropriation made to him by the plaintiff of the goods. *See Atkinson v. Bell*, 8 B. & C., 277, *ante* p. 146.

An action for not accepting, lies against a purchaser who refuses to take goods, although the vendor has resold them. *Maclean v. Dunn*, 4 Bing., 722; *Acebal v. Levy*, 10 Bing., 384.

In this action a legal contract must be proved, and therefore where the price of the goods amounted to 10*l*, a compliance with the Statute of Frauds must be shewn, as in an action for the price of goods bargained and sold. Where a party under one contract purchases goods ready made, and orders others to be made, an acceptance of the former goods is a sufficient compliance with the Statute of Frauds, and the Statute of Geo. IV., c. 14, s. 7, to render him liable to pay for the goods ordered to be made, and which he has refused to accept. *Scott v. Eastern Counties Railway*, 13 L. J., Ex., 14.

As already stated, the amount to be recovered in this action is the loss or damage the plaintiff has sustained by the non-performance, by the defendant, of his contract. As

the plaintiff has the goods, he will not recover their value, but he may sometimes recover warehouse room, or the like.

Where the defendant was to pay for the goods by a bill, the plaintiff is entitled to recover interest from the time the bill if given would have become due; *Boyce v. Warburton*, 2 Camp., 480. The difference between the contract price, and the market price on the day the contract was broken, is the measure of damages. *Boorman v. Nash*, 9 B. & C., 145.

ACTION BY VENDEE AGAINST VENDOR FOR NOT DELIVERING GOODS BARGAINED AND SOLD.

In an action against the vendor of goods for not delivering them, [the plaintiff must prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages. *Roscoe*, 6th edit., p. 269.

The contract.]—The contract must be proved as in an action for goods bargained and sold.

A, by letter, offered to sell to B, certain goods "receiving an answer by the course of post." In consequence of A's misdirection, B's acceptance of the offer arrived two days later than it ought to have done; and on the day following that when it should have arrived, A sold the goods to a third person. It was held that there was a binding contract from the moment the offer was accepted, and that B might sue A in an action for the non-delivery; *Adams v. Lindsell*, 1 B. & A., 681. But, in general, where an offer is made, the party who makes it may retract it at any time before acceptance; *Cooke v. Oxley*, 3 T. R., 653; *Routledge v. Grant*, 4 Bing., 653. So the bidder at an auction may retract his bidding before the hammer is down. *Payne v. Cave*, 3 T. R., 148.

Where L. & Co., brokers, sold hemp by auction, described in the invoice as bought of "L. & Co.," and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves, in an action for non-delivery, by evidence that they sold as agents, and that the invoice had been made out in their names, according to a local custom of brokers to secure the passing of the purchase money through their hands. *Jones v. Littledale*, 6 A. & E., 486.

Where two parties agree to barter goods for goods, and the balance being in favour of the plaintiff, the defendant omits even for three years to send goods to meet it, the lapse of time does not entitle the plaintiff to bring an action for goods sold, his remedy is by an action against the de-

fendant for not delivering goods. *Harrison v. Luke*, 14 *L. J., Ex.*, 248.

Performance of conditions precedent.—Where the contract was for the sale of sponge, to be paid for by ochre, &c., the value to be delivered on or before 24th inst.; in an action for not delivering the sponge, it was held that the delivery of the ochre on the 24th, was a condition precedent to the plaintiff's right of action; *Parker v. Rawlings*, 4 *Bing.*, 280. The defendant having applied to the plaintiff to sell him some fleeces, and agreed at the same time to supply the plaintiff with coarse woollen cloths, called "noils," the following bought note was delivered: "Bought of Messrs. W. F. A., (the plaintiffs) thirty packs of Cheviot fleeces, &c., and agreed (i. e., the plaintiffs agreed) to take the under-mentioned noils; also agreed to draw for £250, on account at three months. Sixteen packs, No. 5, noils, &c." signed &c. It was held that the stipulations in the contract were dependent, and that the plaintiffs, who had not delivered the whole of the fleeces, could not maintain an action against the defendant for not delivering the noils, without proving at the trial that they had delivered or offered to deliver the fleeces to the defendant. *Atkinson v. Smith*, 15 *L. J., Ex.*, 59. Where the agreement was to pay a sum "for each load of straw delivered on the premises," it was held that this imported payment for each load as delivered, and that the purchaser refusing so to pay, the vendor was not bound to send any more loads. *Withers v. Reynolds*, 2 *B. & Ad.*, 882.

To prove the fact that the plaintiff was ready and willing to accept the goods, and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 *East*, 203; *Waterhouse v. Skinner*, 2 *B. & P.*, 477; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing; *Wilkes v. Atkinson*, 1 *Marsh*, 412; *Levy v. Lord Herbert*, 7 *Taunt.*, 318. The demand may be by the plaintiff's servant. *Squier v. Hart*, 3 *Price*, 68.

Damages.—In this action the plaintiff recovers whatever loss he may have sustained by the defendant's omission to perform the contract. In the ordinary case of a purchaser buying or ordering goods, the seller is the loser if he neglects to deliver them, for the purchaser has only to go elsewhere, but where the goods are of fluctuating value, and the purchaser is obliged to make a subsequent purchase at a higher price, or has sustained loss of profits which would have accrued to him by a resale of the goods at a particular period, he is entitled to damages corresponding with the loss proved.

Where goods are to be delivered at a future day, the damages are the difference between the contract price, and the price of the goods at or about the day when they ought to have been delivered. *Boorman v. Nash*, 9 B. & C., 145; *Startup v. Cortazzi*, 2 C. M. & R., 165.

EVIDENCE IN ACTIONS FOR BREACH OF WARRANTY OF GOODS, &c.

§ 1. *Warranties in general.*

§ 2. *Warranties of horses.*

WARRANTIES IN GENERAL.

Where goods or other things have been sold with a warranty, as to their quality, which has not been kept, the purchaser may maintain an action upon the warranty to recover damages for the breach, or in some cases he may rescind the contract, and recover the money paid for the goods, &c, in a plaint for *money had and received*; see *post*, *actions relating to money*.

In an action for the breach of warranty, the plaintiff must prove, 1st, the contract relating to the sale, viz., the consideration and the promise or warranty; 2nd, the breach of the warranty; and 3rd, the damages sustained by such breach.

The contract.—A warranty is given in consideration of the plaintiff purchasing the article, or thing in respect of which it is given, so that the plaintiff must prove the purchase, *i. e.*, the consideration, as well as the warranty. They are necessarily so mixed up, that proof of the one requisite generally involves proof of the other.

The general rule is that although a liberal price be given for goods, and which the purchaser has the opportunity of inspecting, the law does not imply a warranty as to their goodness or quality, and no liability in general exists, in regard to bad quality or defects, unless there be a special warranty, or fraud on the part of the vendor. Thus, in the case of the sale of a horse, the plaintiff must prove an express warranty, and a high price is not tantamount to it; see *post*. Nor is there any implied warranty upon the exchange of goods. Therefore, where a customer who had bought a quantity of Burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for other wine; it was held that although the Burgundy, when exchanged, had become sour, the wine merchant was without remedy, there having been no

fraud or express warranty. *La Neuville v. Nourse*, 3 *Camp.* 381.

Warranty express or implied.—Generally speaking, therefore, the plaintiff must prove an express warranty, but sometimes it may be implied. Thus where an article is sold for a particular purpose, as a rope to lift goods by a crane, there is an implied warranty that it is reasonably fit for such purpose; and the vendor is liable on such warranty, though he was not the maker of the rope. *Brown v. Edgington*, 2 *M. & G.*, 279. Where a publican agrees with a brewer to take all his beer from him, the brewer is bound to supply him with beer of a fair merchantable and wholesome quality. *Holcombe v. Hewson*, 2 *Camp.*, 391; and so as to provisions in general, 3 *Bla. Com.*, 166.

A promise or warranty, that the goods to be delivered shall be of a *merchantable quality*, of the kind ordered, is implied, where the purchaser had not, before or at the time of sale, a sufficient and reasonable opportunity of inspecting them; and there are no circumstances (as the smallness of the price, &c.) to negative the presumption that goods of that description were meant to be bought; but without a warranty the purchaser cannot insist that the goods shall be of any *particular* quality or fineness; *Gardiner v. Gray*, 4 *Camp.*, 144. But if an order be given for a specific and defined thing, though that order is accompanied with an intention that the thing is to be used for a particular purpose, which the buyer believes it will answer, the manufacturer performs his contract by supplying the specific article, and there is not any implied warranty that it shall answer such purpose. *Chanter v. Hopkins*, 4 *M. & W.*, 399.

The custom of any particular trade may establish an implied warranty. Thus, where sheep are sold as *stock*, and evidence was given that by the custom of the trade stock were understood to be sheep that were sound, it was ruled that it was an implied warranty.

An express warranty may be either verbal or in writing, and may be proved by a subsequent admission of the defendant. If in writing it need not be stamped, as an agreement, but if it contains a receipt for the price, it must have a receipt stamp. *Skrine v. Elmore*, 2 *Camp.*, 407.

The plain terms of a written warranty cannot be contradicted or varied by verbal evidence; *see ante*, p. 16. In an action on a warranty of "prime singed bacon," parole evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon;" *Yates v. Pym*, 6 *Taunt.*, 446; *see Woodhouse v. Swift*, 7

C. & P., 310. And if there be only a warranty, written or verbal, that goods correspond in quality with a sample shewn, there can be no implication of any warranty besides that so given. *Parkinson v. Lee*, 2 *East*, 314.

A simple commendation of the goods by the vendor, as to their quality or fitness, does not necessarily amount to a warranty. In such a case the question is for the jury. The seller of some pictures gave, at the time of sale, the following bill of parcels, "Four pictures, views in Venice, Canaletti, 160*l*." The judge left it to the jury on this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name was used merely as matter of description or intimation of opinion. The jury found a contract of warranty, and it was held that the question had been properly left to them. *Power v. Barkam*, 4 *A. & E.*, 473.

On the sale of a cargo of "good merchantable oil," consisting of "L. R. 240 casks," the warranty extends only to the oil, that being the subject-matter of description, and the contract would be binding on the vendee, though the casks in which the oil was contained were not merchantable. *Gower v. Dedalsen*, 3 *Bing.*, *N. C.*, 717.

No particular form of words is necessary to constitute a warranty: the word *warrant* need not be used. *Jones v. Bright*, 5 *Bing.*, 533, *S. C.*

A sale of goods by sample, is, in effect, a sale by warranty; but if there are sale notes, or any other written agreement, not alluding to the sample, there is no sale by sample, and an action lies on a written warranty, if the goods do not answer the description therein mentioned, although they accord with a sample shown when they were bought. *Tye v. Fynmore*, 3 *Camp.*, 462.

If goods are sold expressly "with all faults," the seller is not liable to an action in respect of latent defects, although he was aware of their existence, and did not disclose them to the vendee; unless some artifice or fraud were practised to prevent the latter from discovering such defects. *Baglehole v. Walters*, 3 *Camp.*, 154; *Pickering v. Dowson*, 4 *Taunt.*, 779.

Warranty, when given.—The warranty must be made during the treaty, or at the time of sale, or, at least, before the performance of its main terms. A warranty, after the sale was complete, or the contract was performed, would seem to be ineffectual for want of consideration. *Chitty on Contracts*, 3rd edit., 453.

Breach of warranty.—The plaintiff must prove that the subject-matter of the warranty did not sustain it. The evi-

dence must be of a positive kind, and of course varies with the nature of the transaction. It is not necessary to offer to return the goods previously to an action for the breach of an express warranty, or at any other time; nor is there any necessity to give notice or to complain of the breach to the seller—but the absence of it raises a presumption against the purchaser.

The defendant's *knowledge* of the defect or bad quality of the goods need not be proved, as he is answerable on his warranty notwithstanding; although in an action for deceit where there is no warranty, it is necessary to prove the knowledge.

Damages.—If the article has been returned, the plaintiff will be entitled to recover the whole price; if kept or resold, the difference between the real value and the price paid in the first instance.

WARRANTY OF HORSES.

The warranties out of which actions most frequently arise, are those given on the sale of horses—and it will therefore be a convenient course to consider the requisite points of proof already stated, under this particular head.

The contract of warranty, and the consideration for which it is given.—The plaintiff must prove an express warranty; *Parkinson v. Lee*, 2 East, 314; but it may be either verbal or in writing, and may be proved by verbal evidence, although there be a written memorandum of the sale and price not mentioning a warranty; *Allen v. Pink*, 4 M. & W., 140. "Received of B 10*l.* for a gray four-year old colt, warranted sound," is only a warranty of soundness, and not a warranty of age; *Budd v. Fairmaner*, 8 Bing., 48. Where the warranty was, "To be sold, a black gelding, five years old—has been constantly driven in the plough—warranted;" this was held to be only a warranty of soundness; *Richardson v. Brown*, 1 Bing., 344. Proof that a horse is a good drawer, will not satisfy a warranty that he is "a good drawer and pulls quietly in harness;" *Coltherd v. Puncheon*, 2 D. & R., 10. If the seller says, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knows it to be unsound, he is answerable on this qualified warranty, because he is guilty of fraud. *Wood v. Smith, M. & M.*, 539; 4 C. & P., 45.

Where there is a manifest defect to which the attention of the parties is called at the time of the bargain, a general warranty of soundness will not be deemed to extend to it; *Margetson v. Wright*, 7 Bing., 603. A splint has been held not to be such a manifest defect; *Margetson v. Wright*,

8 Bing., 454. And a general warranty will not extend to defects that are plain and obvious to the senses of the purchaser, and require no skill to detect them: as if a horse be warranted perfect, and want an ear or a tail, &c.; or be of so bad a shape as even to render it incapable of working; *Dickenson v. Follett*, 1 M. & Rob., 299. But if on the sale of a horse, the seller agrees to deliver it sound and free from blemish, at the expiration of a specified period, the warranty is broken by a fault in the horse when delivered, although such defect existed and was patent and obvious at the time of the sale. *Kain v. Liddard*, 2 Bing., 183.

In many instances the positive representation of the seller is not, from the nature of the case, to be regarded as a warranty, but merely as an expression of his belief and opinion on the matter. Thus where the defendant, not knowing the age of a horse, but having a written pedigree which he received with him, sold him as a horse of the age stated in the pedigree, at the same time stating that it was his only source of information; it was held that this was, no warranty; *Dunlop v. Waugh*, *Peake's Rep.*, 123; see also *Geddes v. Pennington*, 5 Dow., 184. But an assertion by the vendor in the course of conversation and dealing, and before the bargain was complete, that "the vendor might depend upon it that the horse was perfectly quiet and free from vice," was held to be a warranty to that effect. *Cave v. Coleman*, 3 M. & R., 2.

As already observed (*ante*, p. 158), where there is an express written (or, it seems, verbal) warranty, the vendee is not at liberty to avail himself, in addition thereto, of any representations not embodied in the contract, and made by the vendor without fraud; but certain rules painted on a board affixed to the walls of a repository for the sale of horses may be connected with and become part of the contract of sale, there being evidence that such rules had come to the purchaser's notice at the time of the sale; *Bywater v. Richardson*, 1 A. & E., 508. So the printed conditions of sale pasted in front of the auctioneer's box in a sale by auction, form a part of the terms of the contract of sale. *Mernardo v. Aldridge*, 3 Esp., N. P. C., 271.

The plaintiff must comply with the conditions of the warranty.—Where a horse is sold by private sale at a repository for the sale of horses, where the terms of the sale of horses are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of those terms, though nothing is said respecting them at the time of sale; and if one of the terms is, that the horse being found to be unsound, must be returned within twenty-four

hours, it must be complied with, though the unsoundness is of such a nature as may not be discovered within that time. *Bywater v. Richardson*, 1 A. & E., 508.

Proof of warranty by admission.—An admission of the plaintiff is sufficient proof. Thus, where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale. *Salmon v. Ward*, 2 C. & P., 211.

Warranty by servant.—A servant employed to sell a horse has an implied authority to warrant the horse to be sound, and it is enough to prove that it was given by the servant, without calling him, or shewing that he had any special authority for that purpose; *Alexander v. Gibson*, 2 Camp., 555; and even where a horse-dealer has express directions not to warrant, but does warrant, the master is bound, unless the purchaser has notice that the general authority is circumscribed; *Pickering v. Busk*, 15 East, 45; *Helyear v. Hawke*, 5 Esp., 75. But if the servant of another person (not a horse-dealer) warrants a horse contrary to his master's orders, the master is not bound by it. *Bank of Scotland v. Watson*, 1 Dow. Parl., c. 45.

Where, on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant, who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, warranted sound "to the regiment," it was held that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands; *Strode v. Dyson*, 1 Smith, 400. And although a warranty given by a person entrusted to sell, *primâ facie* binds the principal, the warranty of a person entrusted merely to deliver the thing sold is not binding on the principal unless an express authority be shewn. Therefore, where the horse had been already sold, and the vendor's servant, on delivering him to the purchaser, made certain statements, and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statement or receipt; no express authority to warrant being shown; *Woodin v. Burford*, 2 C. & M., 391. What is said by the servant at the time of the sale respecting the horse is evidence, without calling him as a witness; but an acknowledgment at another time is not so; and in that case the servant must be called; *Helyear v. Hawke*, 5 Esp.; and see *Irving v. Motly*, 7 Bing., 543. Where in an action on the warranty of a horse sold by the

son of the defendant as agent for his father, a part of the defence being that the son had no authority to warrant, it was proposed to ask a witness whether, on the day on which the sale took place, the defendant's son did not, in answer to a question put by the witness as to the price of the horse, say that he would warrant the horse, it was held inadmissible, as being a conversation with a stranger; but that if the defendant's son, in offering the horse for sale, had offered a warranty, it might have been otherwise, as that would have been a statement accompanying an act done in the course of his agency. *Allen v. Deustone*, 8 C. & P., 760.

Proof of warranty in receipt.—A receipt for the price, containing the warranty, is admissible to prove the latter, though only bearing a receipt stamp, *Skrine v. Elmore*, 2 Camp., 407; but such a receipt, given after the bargain, is not *conclusive* evidence of it. *Fairmaner v. Budd*, 7 Bing., 574.

Proof of consideration or sale.—The sale and consideration may be shown by proof of payment of the money, and this is commonly done by the production of the receipt and proof of the defendant's handwriting. The receipt must for this purpose be properly stamped.

Breach of the warranty.—If the warranty be one of soundness, the plaintiff must give positive proof of unsoundness at the time of the sale; a suspicion that the horse was unsound is not sufficient; *Eaves v. Dixon*, 2 Taunt., 343. The term "sound" implies the absence of a disease or the seeds of a disease, which impairs the natural usefulness of the animal; *Kiddell v. Burnard*, 9 M. & W., 688. A slight disorder in a horse at the time of sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of warranty, *Bolden v. Brogden*, 2 M. & Rob., 113; and it has been ruled that a warranty that a horse is sound, is not false because the horse labours under a temporary injury from an accident; *by Eyre, J., Garment v. Barre*, 2 Esp., 673. But Lord Ellenborough ruled that an infirmity, as a temporary lameness, which renders a horse less fit for present use or convenience, though not of a permanent nature, and though removed after action brought, was an unsoundness, *Elton v. Brogden*, 4 Camp., 281. A cough at the time of sale, though not permanent, is therefore an unsoundness, *Coates v. Stephens*, 2 M. & Rob., 157; *Shillito v. Claridge*, 2 Chit., 425; roaring constitutes unsoundness, if the horse is thereby rendered less serviceable for a permanency, *Onslow v. Eames*, 2 Stark., 81; but it is not unsoundness unless it be shewn

to proceed from some disease or organic defect. *Bassett v. Collis*, 2 *Camp.*, 523. Mere badness of shape (such as may produce cutting), though it may render the horse incapable of work, is not unsoundness. *Dickenson v. Follett*, 1 *M. & Rob.*, 299; *Brown v. Elkington*, 8 *M. & W.*, 132; a nerved horse is unsound, *Best v. Osborne, R. & M.*, 290; 2 *C. & P.*, 74; crib-biting which has not produced disease or alteration of structure is not "unsoundness," but is a vice under a warranty that a horse is sound and free from "vice;" *Scholefield v. Robb*, 2 *M. & Rob.*, 210. Whether thrushes or quidding be unsoundness, is a disputed question, *Bassett v. Collis*, 2 *Camp.*, 524; but a splint, existing at the time of warranty, which afterwards produces lameness, is an unsoundness, *Margetson v. Wright*, 8 *Bing.*, 454. So, bone spavin in the hock, whether it produce lameness at the time or not, *Watson v. Darton*, 7 *C. & P.*, 85, or chest foundered. *Atterbury v. Fairmaner*, 8 *B. Moore*, 32.

It need not be proved that the defendant knew of the unsoundness, *Williamson v. Allison*, 2 *East*, 446. When there was a warranty, it was held that though the plaintiff discovered the unsoundness shortly after the purchase, and gave no notice of it, but kept the horse nine months and endeavoured to cure it, he was still entitled to recover. *Pateshall v. Tranter*, 3 *A. & E.*, 103.

Where a horse was warranted "a thorough-broke horse for a gig," and the purchaser had no opportunity of using him in a gig for two months, but other persons had done so, and he had always answered the warranty, but after that time the purchaser himself drove him, when he kicked and broke the gig, &c., it was held that the horse answered the warranty at the time he was sold, and that the damage was owing to unskilful driving. *Geddess v. Runington*, 5 *Dowl.*, 164.

Damages.—If the horse has been returned, the plaintiff will be entitled to recover the whole price paid for him; if the horse is not returned, the measure of damages is the difference between the real value and the price given, or the plaintiff may sell the horse for what he can get, and recover the residue of the price in damages. *Caswell v. Coare*, 1 *Taunt.*, 566.

It is, however, only where there is a condition in the contract authorising the return, or the vendor has received back the horse, and has thereby actually rescinded the contract, or has been guilty of a fraud which destroys the contract altogether, that the purchaser may recover back the full price; *Street v. Blay*, 2 *B. & Ad.*, 462; *Gompertz v. Denton*, 1 *C. & M.*, 207; *Edwards v. Chapman*, 1 *M. & W.*,

231. Where, by the contract, the purchaser has the power of returning the horse if unsound, an offer to return or tender, puts an end to the contract. The purchaser must return the horse within a reasonable time; *Dr. Compton's case*, cited 1 *T. R.*, 136; *Adam v. Richards*, 2 *H. Bla.*, 574; and in the state as sold, not diminished in value by doctoring, &c.; *Curtis v. Hannay*, 3 *Esp.*, 82. Where a horse was warranted sound, and the vendor said in a subsequent conversation that, if the horse were unsound he would take it again and return the money, it was held that the original contract was not abandoned, the horse not being actually taken back. *Payne v. Whale*, 7 *East*, 274.

Where the contract is rescinded, the plaintiff may recover the price in an action for money had and received, (*see ante*, p. 157,) but in actions in the County Court this merely affects the form of plaint, as the evidence is the same whether the plaint be for *breach of warranty* or for *money had and received*, except that in the latter case the plaintiff must prove the power to rescind or the actual rescision by consent. *Roscoe*, 6th edit., 249.

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time till he can sell it to the best advantage, and may recover for the keep in the mean time, *Ellis v. Chinnoct*, 7 *C. & P.*, 169; and the same if notice is given to the vendor that the horse may be taken away, and the question as to what is a reasonable time, is one for the jury, if there be one; *Chesterman v. Lamb*, 2 *A. & E.*, 129. In an action for breach of warranty of a horse, the plaintiff cannot recover as special damage the loss of a bargain for re-sale of the horse at an advanced price, though the contract of re-sale at a profit had been actually completed before the unsoundness was discovered, at least not unless the increased value of the horse was owing to the outlay by the plaintiff since it was in his possession.—*Clare v. Maynard*, 6 *A. & E.*, 519; but where the plaintiff had bought a horse of the defendant for 100*l.*, and had been offered 140*l.* for him; but the horse proving unsound, the plaintiff had been obliged to give up the bargain and sell him for 47*l.* 5*s.*; Lord Denman, C. J., held that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of the horse, if he had been sound; *Cox v. Walker*, 6 *A. & E.*, 523.

Where there has been an express warranty, and the vendee relying thereon, has resold the horse or other thing with a similar warranty, and being sued thereon by his sub-

vendee, offers the defence to his vendor, who gives no defence as to the action, the vendee may, it seems, recover the damages and costs paid by him to the sub-vendee, and also the costs of his defence as part of the damages occasioned by the breach of warranty, *Lewis v. Peake*, 7 Taunt., R., 153; unless at the time of the return he might by a reasonable examination of the horse, &c., have discovered that at the time of the sub-sale it did not answer the warranty, so that the defence was therefore a rash one. *Wrightup v. Chamberlain*, 7 Scott, 598.

Defence.—The facts constituting a defence to an action on a warranty, may be gathered from the statement of the requisite proof by the plaintiff.

The most frequent defence in an action on a horse warranty is a denial of the alleged unsoundness or vice, or that it was the result of improper treatment or want of skill in the plaintiff or his servants.

An infant cannot be sued on a warranty of a horse, *Howlett v. Haswell*, 4 Camp., 118, and therefore infancy (*see ante*, p. 30,) is a good defence, even although fraud be alleged. *Green v. Greenbank*, 2 Marsh, 485.

As to defences in general, *see ante*, p. 29 to 107.

The plaintiff and defendant may be called to prove the facts on either side.

ACTION ON CONTRACT FOR THE RECOVERY OF GOODS WRONGFULLY DETAINED.

Where goods are wrongfully detained by another from the person having the legal right to the possession of them; an action for *tort* may in all cases be maintained to recover damages, which are in general regulated by the value of the goods (*see post*, *actions of tort*); but in some cases of the wrongful detention of goods, the party entitled to them may bring his action on a contract, which in those cases the law implies to exist between the parties.

This species of contract is called in the superior courts an action of *detinue*.

In many cases it is immaterial whether the plaintiff brings his action on contract or for tort, as in either case he recovers the value of the goods; but on the other hand a distinction exists which may make it preferable to frame the plaint on contract, where the circumstances of the case admit of it; for where the plaintiff has another demand in the nature of a debt, against the defendant, he may in some cases, by framing his plaint on contract, join both claims in one action. In the superior courts, moreover, the judgment

in actions of *detinue* is, that the plaintiff shall have the goods, or if they cannot be had, then damages; but in *trover* the judgment is for damages. In the County Courts, however, as there is one general form of judgment for damages in all cases, there does not appear to be any advantage in this respect in framing the plaint *on contract*, instead of *for tort*.

In what cases of detention the action on contract may be maintained.]—As the plaintiff in this action is entitled to recover the things in specie which are detained, the action, therefore, lies to recover such personal chattels only, as can be identified. Therefore the action on contract will not lie for money, unless in a box or bag; nor for corn unless in a sack; for such things have no mark by which they can be known, in order that they may be redelivered to the plaintiff, if he have judgment. It will not lie to recover animals *feræ naturæ*, for they are not personal chattels. But it lies for title-deeds, &c., and it is a very usual remedy adopted for the recovery of them. It lies also for writings in a box, or for the writings themselves, though not in a box, and although not described as deeds; *vide Archbold's Nisi Prius*, vol. 1, 2nd edit., p. 393. This action to recover title-deeds, is not likely to arise frequently in the County Courts, as the value of them is generally beyond their jurisdiction, or involves questions of title.

The plaintiff in this action must prove, 1st—such a title in himself to the goods, as shews that he had the right of property in him, as owner or as bailee, and the right to immediate possession of them. 2nd—a detention of the goods by the defendant; and lastly, the value of each of the articles sought to be recovered. *Archbold's Nisi Prius*, vol. 1, 2nd edit., p. 401, 398, 399.

As the evidence on these points is of the same nature as where the action is brought for a tort, and the latter form is of more frequent occurrence; the reader is referred to that head, *post*, Part II.

CONTRACTS FOR THE USE OF GOODS AND THE OCCUPATION OF PREMISES, &c.

Under this head, all actions for the letting and occupation of land, houses, apartments, for board and lodging, for the hire of carriages, horses, &c., are included. In all these cases the plaintiff must prove the contract for letting and

hiring, and in general the occupation or use by the defendant of the subject matter of the contract, and the amount of remuneration to which the plaintiff is entitled. As in the case of actions for the prices of goods where the contract to pay may be implied from the delivery and receipt (*see ante*, p. 3), so contracts to pay for the use of goods and the occupation of premises may be implied from the act of user or occupation. So likewise, when the contract is in writing, the general rules stated *ante*, pp. 14 to 28, are applicable.

As to defences, *see ante*, pp. 30 to 107.

The evidence in actions for the occupation or renting of premises, requires to be more particularly noticed.

EVIDENCE FOR THE PLAINTIFF IN ACTIONS FOR RENT.

Wherever the plaintiff seeks to recover a sum of money for rent, whether the defendant occupied premises under a deed, or a written or verbal agreement, or the claim arises from the simple fact of occupation without any previous agreement, the plaint may be for 'rent,' the various nature of the occupation simply affecting the evidence in support of the claim. Many of the distinctions in actions in the Superior Courts between actions for rent and for use and occupation, and the selection of the appropriate forms of action, are inapplicable to proceedings in the County Court, where the plaintiff may use the word *rent* in its ordinary and popular sense. Where, however, the claim for rent is not founded on any demise or lease by deed, the form of the plaint may be for 'use and occupation;' but as the word *rent* is more simple, and at the same time sufficiently explicit to inform the defendant of the nature of the demand, it seems to be the better term, at least in all cases where there has been an occupation upon terms previously agreed. An action for use and occupation may, however, be maintained, where there is no relation of landlord and tenant existing between the parties.

Where there is a lease.]—Where there is a lease executed by the defendant, and the rent is specified in it, the plaintiff will merely have to prove the execution of the lease by the defendant, by proving his handwriting in the manner stated (*ante*, p. 23), or if there is an attesting witness, by calling him. *See post*, actions on promissory notes.

It is to be observed, that a lease made since the 1st of October, 1845, must be by deed, (*i.e.*, under seal,) if it be a lease required by law to be in writing. *See* 8 & 9 *Vict.*, c. 106, s. 3.

The leases required by law to be in writing, are leases for

more than the term of three years from the making thereof. 29 Car. II., c. 3, s. 1.

If it appears from the plaintiff's witnesses that the defendant holds under a lease or written agreement not produced; or which when produced, cannot be read for want of a stamp; the plaintiff will not be allowed to give parol evidence of the holding. *Brewer v. Palmer*, 3 Esp., 213; *Ramsbottom v. Morley*, 2 M. & S., 445; *R. v. Padstow*, 4 B. & Ad., 208; and *see ante*, p. 16.

Where the plaintiff attempted to make out that the defendant had held land under a lease from E, on certain terms; that the reversion came to the plaintiff; that the defendant, in consideration of an alteration of the rent, promised to hold of the plaintiff on the same terms in all other respects; it was held that the plaintiff not having proved an express contract to hold of the defendant on the old terms, could not rely upon an implied contract arising from the old lease, without putting it in evidence; and that it could not be used for such purpose without being properly stamped. *Wallis v. Broadbent*, 4 A. & E., 877.

Where there is no lease.—Where there is no lease the plaintiff must prove the contract, express or implied, and an occupation, also express or constructive, of the premises by the defendant, under the plaintiff; and the amount of rent either expressly reserved or due on the footing of a *quantum meruit*.

Contract, express or implied.—Although there may be no formal instrument amounting to an express demise, the plaintiff may give in evidence any agreement for the letting, whether verbal or in writing. Such agreements, if in writing, and of the value of 20*l.*, must be properly stamped. The amount of stamp is 2*s.* 6*d.*, if the agreement does not exceed 15 folios in length. If above that, it must have a 1*l.* 15*s.* stamp, and a further progressive duty of 1*l.* 5*s.* for every 15 folios above the first.

Although the distinction between a formal lease and a mere agreement or memorandum, must be borne in mind, (for as already stated, where there is a lease the plaintiff has only to prove its execution, but when there is merely an agreement, although that may shew the terms upon which the defendant holds, the plaintiff must prove an express or constructive occupation by the defendant,) it would be beyond the limits of this work to enter into the question of what terms in a written instrument do or do not amount to an actual demise or lease.

It may be observed in this place, that although the plaintiff be worded for use and occupation, under which the plaintiff,

in the absence of any express contract, may recover the actual value, yet that the plaintiff may under that form of plaint give in evidence any special agreement or memorandum, not by deed, to prove his case. *See 11 Geo. II., c. 19, s. 14.*

Where there is an agreement between the parties, the agreement is of course the proper medium of proof, and if in writing, must be proved by evidence of the handwriting, or by calling the attesting witness, if there be one (*see ante*, p. 27.) It is not, however, necessary that there should be a contract in fact, creating the relation of landlord and tenant between the parties; the relation may be implied. If the defendant took possession of the premises with the consent of the plaintiff, who remains owner, in the absence of any evidence as to the terms of the occupation, the law presumes that the defendant is to pay the plaintiff as much as the premises are worth for the period the defendant so occupied. Where the defendant was let into possession and occupation of land by the plaintiff under a contract, to purchase which contained no stipulation as to the terms of occupation, and the contract afterwards went off on the ground of the plaintiff not being able to make a title, he is not liable for use and occupation; *Winterbottom v. Ingham*, 14 L. J., Q. B., 298. And where the owner of property sells it, and remains in possession adversely, no implication of tenancy arises; and where a tenant in common of five houses, occupying one of them, joined his co-tenant in the sale of the five, and continued in the occupation of the one for two years afterwards, it was held that these facts alone were not evidence of a tenancy, and that he could not be sued by the purchaser for use and occupation; *Few v. Jones*, 14 L. J., Ex., 94. But where the defendant entered into a contract to sell premises, and gave up the possession, but subsequently gained possession of them from a sub-vendee, by falsely representing that the contract was at an end, he was held liable during such possession for use and occupation, though at that time he was the legal owner. *Hull v. Vaughan*, 6 Price, 157.

Where the defendant entered into an agreement in writing with the plaintiff, by which he was bound to lodge with the plaintiff at a certain weekly sum, and the plaintiff agreed to take, in payment for the board and lodging, certain furniture of the defendant then in the plaintiff's house; and the furniture having afterwards, and before the plaintiff had appropriated it, been taken in execution for a debt of the defendant to another person, it was held that the plaintiff was entitled to recover in an ordinary action

for board and lodging, as if the special contract had never existed. *Keys v. Harwood*, 15 L. J., C. P., 207.

A lessee, whose under-lessee holds over against the lessee's will, is liable to this action; *Ibbs v. Richardson*, 9 A. & E., 849. So, a tenant, who has quitted in pursuance of a parol surrender to his landlord, without having given or received a notice to quit, remains liable, *Mollett v. Brayne*, 2 Camp., 104; and see *Matthews v. Sawell*, 8 Taunt., 270; *Thomson v. Wilson*, 2 Stack., 379; *Johnstone v. Hudleston*, 4 B. & C., 922; even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of getting another tenant for the premises, *Redpath v. Roberts*, 3 Esp., 225; *Johnstone v. Huddleston*, 4 B. & C., 922; unless the landlord has actually accepted a third person as tenant; for this operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. & A., 119.

If after the determination of a lease, the tenant holds over and pays rent, such payment is conclusive evidence of a tenancy, and he will be liable in an action for use and occupation for the time he occupies the premises; *Bishop v. Howard*, 2 B. & C., 100. But where a tenant, from year to year after the expiration of his landlord's title, continues in possession for one quarter, and pays rent for that quarter to the party entitled, but quits at the end of it, the payment is not evidence of a tenancy for more than the quarter, and the party entitled cannot sue the tenant for use and occupation beyond the quarter; *Freeman v. Jury*, M. & M., 19; *Jenner v. Clegg*, 1 M. & Rob., 215; but see *Woodcock v. Nuth*, 8 Bing., 170. One tenant cannot bind his co-tenant by holding over without his assent. *Christy v. Tancred*, 9 M. & W., 438; 12 M. & W., 316; and see *Draper v. Crofts*, 15 L. J., Ex., 92.

An executor of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable. *Buckworth v. Simpson*, 1 C. M. & R., 834.

As to the personal liability of overseers to this action on contracts for occupation, see *Uthwatt v. Elkins*, 14 L. J., Ex., 131.

Occupation of the premises by the defendant.—Even where an express agreement can be proved between the parties, written or verbal, the plaintiff should give some evidence of a constructive or actual occupation of the premises, for if there was no occupation whatever in fact, the action should be rather to recover damages for not performing the agreement, than for rent. At least, an action for use and occupation cannot be maintained where there has

not been any occupation whatever by the defendant, although he has entered into an agreement (not being a lease), to take the premises from a specified day; *Wooley v. Watling*, 7 C. & P., 610. Where there is no other contract than that which is to be inferred from the fact of the occupation as tenant, the plaintiff must prove an actual possession by the defendant, or his agents. It is not absolutely essential that there should be an actual occupation of the premises by the defendant himself; for if his under-tenant, or any other person, by his permission occupy, he is liable; thus it has been held, that if A agree to let lands to B, who permits C to occupy them, A may recover the rent, in an action against B, for use and occupation; *Bull v. Tibbs*, 8 T. R., 327. So if the premises were occupied by the defendant's servants; *Bertie v. Beaumont*, 16 East, 33; and see *Waring v. King*, 8 M. & W., 571. Slight evidence of occupation is generally sufficient; thus it has been held, that the putting up of a board for the purpose of letting houses by a person who built them, and agreed to become tenant of them for a certain time, is sufficient to enable the person for whom they were erected to recover rent in an action for such occupation; *Sullivan v. Jones*, 3 C. & P., 579. So, sending in a woman to clean the house, and workmen to paper one of the rooms. *Smith v. Towart*, 2 M. & G., 841.

It is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises, and the continuance of the occupation will be presumed till the contrary appears; *Harland v. Bromley*, 1 Stark., 455; *Ward v. Mason*, 9 Price, 291. A constructive occupation of the premises by the defendant is sufficient, where there is an express agreement to occupy; an occupation which he might have had, if he had not voluntarily abstained from it; *per Gibbs, C. J., Whitehead v. Clifford*, 5 Taunt., 519; *Pinero v. Judson*, 6 Bing., 206; and see judgment of *Cresswell, J., Surplice v. Farnsworth*, 13 L. J., C. P., 216. But there must be an occupation actual or constructive, therefore a tenant, who had agreed to take furnished lodgings, but had not entered, was held not to be liable to an action for use and occupation; *Edge v. Strafford*, 1 C. & J., 391. And where a tenant by written agreement had agreed to take premises from a future day, it was held not to be enough to put in the agreement, but that evidence must be also given of some occupation under it. *Wooley v. Watling, supra.*

An action does not lie against a husband for a half year's rent, due in respect of premises occupied for part of that time by his wife before marriage, as yearly tenant, and

which continued to be occupied by her for a short time after her marriage; *Richardson v. Hall*, 1 B. & B., 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not ensure as the entry of both, so as to make them both liable in an action for use and occupation. *Nation v. Tower*, 1 C. M. & R., 172.

Although the premises are burnt down, and remain unoccupied, a tenant still continues liable for the rent, subsequently accruing during his term, for the premises continue to be "held" by the defendant; *Baker v. Holtsaffell*, 4 Taunt., 45; *Ison v. Gorton*, 5 Bing., N. C., 501; 8 L. J., C. P., 272; unless it be agreed that the liability shall cease after the fire; in which case the lessee will be liable for a proportion of the rent during the time of actual occupation. *Packer v. Gibbins*, 1 Q. B., 421.

Proof that the premises are held under the plaintiff.]—If there is an agreement in writing, the title of the plaintiff is established by it; but if there be no actual agreement, the plaintiff's title, or rather the fact that the defendant holds under him, may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him; *Panton v. Jones*, 3 Camp., 372. Notice to produce the receipts for rent, or the notice of distress, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiff's land under the powers of a local Act, and upon a dispute respecting the right of the plaintiff to demand rent, a decree for payment was made in an amicable suit in chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent. *Allason v. Stack*, 9 A. & E., 255.

Amount of rent.]—In the absence of any agreement, verbal or otherwise, the plaintiff must give evidence of the actual value of the occupation, by calling some competent and disinterested witness. If, however, the defendant has previously paid rent, it will be presumed that he continued to occupy on the same terms.

Where B being tenant to A from year to year, and under notice to quit at Michaelmas, C entered into an agreement with A for a lease of the premises from Michaelmas at an increased rent, A undertaking to put the premises in repair before the commencement of the term, and A afterwards accepted C as tenant, in lieu of B for the remainder of B's term, but A did not put the premises in repair, and no lease was executed; it was held that C was not necessarily to be considered as continuing tenant after Michaelmas at the

rent previously paid, but that he was liable to A for such reasonable rent as the premises were worth. *The Mayor of Thatford, v. Tyler*, 15 L. J., Q. B., 33.

The plaintiff must of course shew that he has a cause of action complete at the time of the entry of the plaints. (As to notices to quit, see post, Part III, *Proceedings to recover possession of Tenements*.) Where the only evidence of the terms on which a furnished house was taken, was the following receipt put in by the landlord: 'Received from C 128*l*. for rent of furnished house from the 8th of May to the 1st of August, 1846,' it was held that the jury might properly infer that the tenancy was weekly. *Towne v. Campbell*, 16 L. J., C. P., 128.

EVIDENCE FOR THE DEFENDANT.

Denial of plaintiff's title.—Where the relation of landlord and tenant subsists between the parties and the defendant has come into the possession from the plaintiff, or has acknowledged his title by the payment of rent to him or otherwise; he will not be permitted to impeach it at the trial; *Sullivan v. Stradling*, 2 Wils., 208; *Cooke v. Loasley*, 5 T. R., 4; *Phipps v. Sculthorpe*, 1 B & A., 50; and if the plaintiff has assigned his reversion in the premises, the tenant is equally precluded from disputing the title of the assignee. Where a party, after letting the defendant into possession on an agreement for a future lease, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover, in an action for use and occupation, rent accruing due for a period subsequent to the mortgage, and unpaid before the notice; *Rawson v. Eicke*, 7 A. & E., 451. A defendant whose tenancy began under A, and who has afterwards paid rent to the *cestui que* trust under A's will, cannot set up the want of the legal estate to an action for use and occupation by *cestui que* trust, though the fact is disclosed by the plaintiff's evidence; *Dolby v. Nes*, 11 A. & E., 335. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may; *per Bayley, J.*, in *Cornish v. Learrell*, 8 B. & C., 475; *Rogers v. Pitcher*, 6 Taunt., 202; *Gravenor v. Woodhouse*, 1 Bing., 38. Thus, where a tenant took premises from "A & B, for, and on behalf of the trustees of the joint estate of C & D;" and it

appeared on the trial on the evidence of the plaintiffs that they were trustees of C only; it was held that the tenant was stopped from taking advantage of this variance; *Fleming v. Gooding*, 10 Bing., 549. So where A hired apartments by the year from B, and B afterwards let the entire house to C, who sued A for use and occupation, it was held that A could not impeach C's title; *Rennie v. Robinson*, 1 Bing., 147. But where the occupier of land, belonging to a parish, paid rent to the churchwardens, who afterwards demised the land, for a term of years, to A, and gave notice to the tenant of the lease, and that he must consider A as his landlord, in an action for use and occupation, it was held that the tenant was not precluded from disputing the lease, and showing that the lessee had derived no valid title from the churchwardens. *Phillips v. Pearce*, 5 B. & C., 433.

Plaintiff's title expired.—Although the defendant cannot impeach the title of the plaintiff under whom he holds, yet he may show that it has expired; *Holmes v. Pontin*, Peake, 99; *Gravenor v. Woodhouse*, 1 Bing., 43; but where the defendant had come in under the plaintiff, Lord Ellenborough held that it was not competent for him to shew that the plaintiff's interest had been forfeited to, and seized by, the lord of the manor, to whom the defendant had since paid rent upon notice and demand made, unless he had at the same time expressly renounced the plaintiff's title, and commenced a fresh holding under the new landlord. *Balls v. Westwood*, 2 Camp., 11.

The defendant may shew that the plaintiff had mortgaged the premises before the defendant became tenant, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice, or the defendant may show payment on such notice, of rent due before the notice; see *Waddilove v. Barnett*, 2 Bing., N. C., 538.

Where the defendant is at liberty to dispute the plaintiff's title, and does so, it is not necessary that he should establish the title in a third person, for as the County Courts have no jurisdiction where the title to any corporeal or incorporeal hereditament is in question, it will be sufficient for the defendant to give such evidence as to shew that the title of the plaintiff is *bond fide* in dispute. *Roscoe*, 6th edit., pp. 200, 201.

Plaintiff's non-performance of condition precedent.—If the defendant can shew the non-performance by the plaintiff of some condition essential and precedent to the occupation of the premises, and there is no occupation by the defendant, it is a good answer to the action; but in such case the

condition must be express and precedent to the occupation; and not merely collateral. The general rule of law is, that if a person contract for the use and occupation of land for a specified time, and at a specified rent, he is bound by that bargain, even though he took it for a particular purpose, and that purpose be not attained through some defect, or quality in the land unknown to him at the time of the contract, and he in consequence has no beneficial occupation; for there is no contract or condition implied by law on the demise of land or houses that they shall be reasonably fit for habitation, occupation, or cultivation, or the purpose for which it is intended, and there is no distinction in this respect, whether there is a written agreement, or a lease under seal, or only a verbal agreement.

In an action for six months' use and occupation of a malt-house, held by the defendant under a verbal demise from year to year, it was held to be no defence to the action that the landlord was under an implied contract to repair the premises, (he having previously, from time to time, repaired them, and allowed the defendant sums paid for such repairs out of the rent,) and that by his neglect they became, during the defendant's tenancy, and prior to the six months for which the rent was demanded, unfit for malting purposes, and were unoccupied by the defendant, who had tendered the keys to the plaintiff, who refused to accept them; for the agreement to do the repairs was not a condition precedent. *Surplice v. Farnsworth*, 13 L. J., C. P., 215. Where the defendant agreed to take the cartage of twenty-four acres of land from the plaintiff, for seven months, at a rent of 40*l.*, and stocked the land with cattle, several of which died a few days afterwards from the effects of a poisonous substance which had accidentally been spread over the field without the plaintiff's knowledge, it was held that the defendant continued liable for the whole rent, although he abandoned the use of the herbage; *Sutton v. Temple*, 12 M. & W., 52; 13 L. J., Ex., 17. In an action for a quarter's rent of a house and garden-ground, taken for three years, an allegation that before the agreement, and at the time the defendant entered, the house was so infected with bugs as to be in an unfit state or condition for habitation, so that the defendant could not inhabit or dwell there, and that before the rent became due he quitted possession, and derived no benefit from the occupation, and gave notice of the fact to the plaintiff, was held to be no defence. If parties intend that leases should be void by reason of any unfitness in the subject for the purpose intended, they must express that meaning; *Hart v. Windsor*, 12 M. & W., 68;

13 *L. J., Ex.*, 129. But where the defendant took a ready-furnished house for five weeks, and quitted before the expiration of a week on account of the house being greatly infested with bugs, but paid one week's rent, it was held, in an action for the balance of rent, that the jury were rightly instructed to find a verdict for the defendant, if they believed that the defendant left the house on account of the nuisance occasioned by these vermin being so intolerable as to render it impossible to remain in it with any reasonable comfort; *Smith v. Marrable*, 11 *M. & W.*, 5; 12 *L. J., Ex.*, 223. This case may be distinguished from that of *Hart v. Windsor*, on the ground that in a contract for a ready-furnished house for a short period, the furniture forms a great part of the value or consideration, and in such case the contract is for a house and furniture fit for immediate use; and resembles the case of a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. See *Judgments in Sutton v. Temple*, and *Hart v. Windsor*, *supra*.

Defendant's occupation determined.]—An agreement, that on the tenant's quitting, the rent shall cease, although in the middle of the quarter, is a good defence; and if a landlord in the middle of a quarter, accepts from his tenant the key of the house, under a verbal agreement that upon her then giving up the possession, the rent shall cease, and she never occupies the premises afterwards, he cannot recover for the time subsequent to his accepting the key; *Whitehead v. Clifford*, 5 *Taunt.*, 318. But delivery of the keys by an agent of the defendant to a servant at the plaintiff's house, is not alone sufficient to prove an acceptance by the plaintiff; *Harland v. Bromley*, 1 *Stark.*, 455. Where A let rooms of a house to B for a year, at a rent payable quarterly, and during the current quarter, in consequence of disputes, B told A that he would leave, and A assented, and on B's leaving, accepted possession of the rooms; it was held that A could recover neither the whole quarter's rent, nor rent for occupation for any period short of the quarter; *Grimman v. Legge*, 8 *B. & C.*, 324. If the defendant has quitted apartments without giving notice, the plaintiff having put up a bill to let them, will not prevent his recovering. *Redpath v. Roberts*, 3 *Esp.*, 225.

As to notices to quit, given by the tenant to the landlord, see *post*, Part III., *Proceedings to recover possession of tenements*.

Surrender of the premises by acceptance of a new tenant.]—In order to make out a surrender in this way, it must

appear that the landlord has given up his old tenant and accepted a new one with the consent of all parties; *Graham v. Whichelo*, 1 C. & M., 188. A, the tenant of a house, three cottages, and a stable and yard, at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B for the remainder of the term, the house and cottages being in the possession of under-tenants. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term, the landlord advertised the whole of the premises to be let or sold. It was held that this was a surrender by operation of law of all the premises; *Reeve v. Bird*, 1 C. M. & R., 31; 4 Tyr., 612., S. C. Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice, and the landlord relet the premises before the end of the next half year to another tenant; it was held that the landlord had evicted the first tenant and could not maintain an action for use and occupation against him for any rent subsequent to the period when he quitted the premises; *Hall v. Burgess*, 5 B. & C., 332. Where the tenant pays up to a certain quarter, and a third person afterwards comes into possession, and pays rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. North*, 8 Bing., 170.

Eviction.—An eviction by the landlord determines the occupation; and where the premises are let at an entire rent, an eviction from some part, if the tenant gives up possession of the residue, is a complete defence; *Smith v. Raleigh*, 3 Camp., 513. If the tenant continues in possession of the residue, it has been said that he is liable *pro tanto* on a *quantum meruit*; *Stokes v. Cooper*, 3 Camp., 514 (n); but see *per Parke, B.*, in *Reeve v. Bird*, 1 C. M. & R., 36; *Neale v. Mackenzie*, 2 C. M. & R., 84; 1 M. & W., 747, S. C. An eviction of the under-tenant is an eviction of the tenant, *Burn v. Phelps*, 1 Stark., 94; *Roscoe*, 6th edit., p. 201; the eviction of the under-tenant by the superior landlord is an answer to an action for rent accruing since the eviction, but not for rent due before. See *Selby v. Browne*, 14 L. J., Q. B., 307.

Defendant treated by the plaintiff as a trespasser.—If the landlord has treated the tenant as a trespasser, he cannot

afterwards recover rent against him. Thus, if he has recovered against him in ejectment, he cannot sue for the rent accruing *after* the day of the demise; for, by not waiving the tort, he has precluded himself from suing *ex contractu*; *Bride v. Wright*, 1 T. R., 378; *Bridges v. Smyth*, 5 Bing., 410. But the mere bringing of an ejectment, and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation. *Cobb v. Carpenter*, 2 Camp. 13 (n); *Roscoe*, 6th edit., p. 202.

Distress.]—That the plaintiff had distrained for the rent is no answer unless the rent be satisfied, not even if he distrained goods to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a rate, the tenant's remedy is by action, *Efford v. Burgess*, 1 M. & Rob., 23; and it is no defence that the tenant quitted without giving notice, in the fear of a distress by the superior landlord. *Rickett v. Tullick*, 6 C. & P., 66.

Illegality.]—It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose, as for the purposes of prostitution; *Crisp v. Churchill*, 1 Bos. & Pul., 340 (n). It seems, however, to be necessary to show that the lodgings were to be used for that purpose, and not merely that a prostitute was to lodge there, but to receive visits elsewhere; *Appleton v. Campbell*, 2 C. & P., 347. Where the lodging was under a weekly tenancy, and it did not appear that the premises had been originally let for the purpose of prostitution, it was held that the plaintiff could not recover the weekly rent which accrued after he was fully informed of the defendant's mode of life. *Jennings v. Throgmorton, R. & M.*, 251.

Statute of Limitations.]—The Statute of Limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred, though no notice to quit has been given. *Leigh v. Thornton*, 1 B. & A., 625.

As to other defences, *see ante*, p. 29 to 107.

ACTIONS RELATING TO PERSONAL SERVICES.

WORK AND LABOUR GENERALLY.

The plaintiff in actions for personal services may in general simply state the demand to be for work and labour. Even in the superior courts, although it is usual in some cases, as

in actions upon an attorney's bill, or on a surgeon's or apothecary's bill, or by a servant or clerk for wages, by a pilot for pilotage, and the like, to state the nature of the work done, and the materials used, yet this is not necessary; it is sufficient to state that the defendant is indebted for work and labour and materials, for the same, generally. Where a farmer declared thus generally for work, labour, and materials, and gave in evidence his attendance on the defendant's horses and the medicines he administered to them, it was held, that any species of work and labour may be given in evidence under such a general count; and that the medicines might be considered materials employed by the plaintiff in and about the business of the defendant. *Clark v. Murnford*, 3 Camp., 37.

If part of the demand consists of the value of materials employed in the work, the form of plaint should be for "work and labour, and materials for the same." If materials be not mentioned, the plaintiff will not be able to recover for them; *Heath v. Freeland*, 1 M. & W., 543; *Cotterell v. Apsey*, 6 Taunt., 322. And where materials are mentioned, it is only in cases where the work and labour, and the materials, can be charged for separately, that the action will lie. If a man contract with another for a particular article, to be manufactured by him, no action will lie by the maker, for work, labour and materials; but if he deliver it, his remedy is by action for goods sold and delivered, or before delivery his remedy is either by action for goods bargained and sold, or a special action on the contract. *Atkinson v. Bell*, 8 B. & C., 277. But a working man employed to *incent* and make a machine may, in an action for work, labour, and materials, recover a remuneration for his skill and labour, where that is the object of the contract. *Grafton v. Armitage*, 15 L. J., C. P., 20.

If by a contract a person is to be paid for his time, whether he work or no, as for instance in the case of one of the performers at a public theatre, he can only recover under this form of plaint for the time he was actually employed. If he would recover for the time when he did no work, he must frame his plaint specially, *Fraser v. Bunn*, 8 C. & P., 704; and if a clerk seeks to recover a commission he must frame his particulars of demand accordingly. *Law v. Thompson*, 15 L. J., Ex., 334.

In an action for work and labour, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and labour; and, 3. The value, if the remuneration is not ascertained by contract. *Roscoe*, 6th edit., p. 283.

The contract.—The plaintiff must prove that he was employed to do the work by the defendant. This may be shown by proof of an express agreement, verbal or in writing, or the contract may in some cases be implied by proof of the work being done, as in actions for goods sold, the contract to pay may be implied from proof of the delivery. *See ante*, p. 3.

In general contracts relating to personal services, as to build, alter, or repair a house, and to provide materials for the purpose, need not be in writing, for the Statute of Frauds relates only to contracts for the *sale of goods*. If, however, the contract is not to be performed within a year, it must be in writing, and in all cases where the contract is in writing it must be stamped as an agreement. The present stamp on agreements not exceeding 15 folios, is 2s. 6d.; if exceeding 15 folios and under 30, 1l. 15s.; and an additional 1l. 5s. for every 15 folios above the first.

Where the defendant employed a person to transport certain goods to a foreign market, and that person employed the plaintiff to do the whole of the business, but without the privity of the defendant, it was holden that the plaintiff could not maintain any action against the defendant for his work and labour; *Schmalzing v. Thomlinson*, 6 Taunt., 147; and this although the defendant may not have paid anything on account of it to the person whom he employed; *Cull v. Backhouse*, *Id.*, 148, (n.) But if the defendant had consented to the plaintiff doing the work, or any part of it, the plaintiff would be entitled to sue him for the amount of such part of the work as he had done after such consent; *Oldfield v. Lowe*, 9 B. & C., 73; and in all cases the plaintiff must prove a contract, express or implied, rendering the defendant liable. *See Holcroft v. Hoggins*, 15 L. J. C. P., 129; and *ante*, p. 112 to p. 122.

In the most simple and general cases of "work and labour," there is no special preliminary agreement between the parties, but the contract is to be implied by proof of the performance of the work and labour. For example, in the case of a gardener who works in a garden, or a labourer who works on a farm, the proof to support a claim for his services would mainly rest on the fact of the work done on the property of and within the cognisance of the defendant, from whose tacit assent the contract to pay a proper remuneration might be implied, without direct proof of the retainer or order to do the particular work. The ability of the plaintiff to give evidence on his own behalf in actions in the County Courts will, however, in general, prevent any difficulty on this head.

If there is a contract in writing, the plaintiff should produce and prove it; the plaintiff in such a case cannot recover even for extras without it; for to prove that they are extras, he must prove the original contract, to show that they are not included in it; *Vincent v. Cole*, *Moody & M.*, 257; *Jones v. Howel*, 4 *Dow.*, 176; *Buxton v. Cornish*, 13 *L. J.*, *Exc.*, 91. That it is in writing, may be elicited from the plaintiff's witnesses in cross-examination, and the plaintiff must then produce it; but if the defendant prove by his own witnesses that the contract is in writing, it is incumbent on him to produce and prove it, if he would derive any advantage from it; *Stevens v. Pinney*, 2 *Moore*, 349; *Fielder v. Ray*, 4 *C. & P.*, 61; and see *R. v. Padstow*, 4 *B. & Ad.*, 512. If, however, there be a written contract, and during the continuance of the work a separate order for other work be given by parol, there is no necessity to produce the written contract in an action to recover the amount of the work done under the verbal contract, *Reid v. Batte*, *Moody & M.*, 413; and see *ante*, p. 16.

It may be stated here, that the assignees of a bankrupt or insolvent (*see ante*, p. 140, 143) cannot sue for the price of the personal labour of the bankrupt or insolvent after the bankruptcy and insolvency; for that would in fact be a letting out to hire of the insolvent by the assignees. See *Williams v. Chambers*, 16 *L. J.*, *Q. B.*, 230.

Performance of the work.]—The plaintiff must prove the work done, and give general evidence of its being well done. See *Townsend v. Neale*, 2 *Camp.*, 191.

If the work has been performed upon materials still in the possession of the workman, it is not necessary that he should first deliver them to his employer before he commences an action for the work or materials; but after he has given his employer a full opportunity to inspect and examine the work, he may sue for the amount of it, and still retain the thing on which his work has been performed until payment; *Planche v. Colburn*, 8 *Bing.*, 14; even although it be in fact the property of his employer; *Hughes v. Lennet*, 5 *M. & W.*, 183. Where there is a special agreement for the performance of work at one fixed price, no action can be maintained for the value of the part done while such contract remains open and incomplete; *Rees v. Lines*, 8 *C. & P.*, 126. But if a workman be employed to do a certain work, he is not bound to wait until the whole of the work be finished, before he commences his action, unless the contract be to do a specific work for a specific sum; and, therefore, where a ship put into a harbour to have repairs done to her, to enable her to continue her voyage, and a

shipwright was employed, who undertook to put the ship in thorough repair; but after he had proceeded at some length with the repairs, he refused to go on, unless he were paid for the work already done; it was holden that he might maintain an action for the work already done, although the repairs were not completed, and although the ship was thereby prevented from continuing her voyage at the time of bringing the action; *Roberts v. Havelock*, 3 B. & Ad., 404; but where the contract was to put a glass lustre into a perfect state of repair for 10*l.*, and after some repairs being done to it, it was returned to the owner in an imperfect state, it was holden that no action could be maintained for the work done. *Sinclair v. Bowles*, 9 B. & C., 92.

The destruction of work by an accidental fire or other misfortune before it is finished or delivered, does not deprive the workman of his right to remuneration to the extent of the work performed; *Menetone v. Athawes*, 3 Burr., 1592; unless by the express and uniform custom of any particular trade, no payment is to be made unless the work be completed and delivered; *Gillett v. Mawman*, 1 Taunt., 137; *Adlard v. Booth*, 7 C. & P., 108; and where the plaintiff contracted to build some cottages by the 10th of October, but they were not finished until the 15th, and the defendant after that day accepted them; it was held that the plaintiff was entitled to recover the value of his work in an action for work and labour. *Lucas v. Godwin*, 3 Bing., N. C., 737.

The price or value of the work.—If by the contract the work was to be done for a specific price, the plaintiff is bound by it, and cannot recover beyond that amount, even although he use better materials than those agreed upon, provided they were used without authority; *Wilmors v. Smith*, 3 C. & P., 453; nor although it appear that he was induced to consent to the contract by fraud on the part of the defendant; and therefore, where A engaged to convey away certain rubbish for B at a specified sum, under a fraudulent representation by B as to the quantity of the rubbish which was to be so conveyed, it was held in an action for the value of the work actually done, that A could recover only according to the terms of the special contract, although he might, when he discovered the fraud, have repudiated the contract, and sued B for the deceit; *Selway v. Fogg*, 5 M. & W., 83; and where work is done under a special contract, and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the

estimate is not thereby excluded, but continues still to be the rule of payment so far as the special contract can be traced; and for any excess beyond it, the party will be entitled upon a *quantum meruit*; *Robson v. Godfrey*, 1 *Stack.*, 275. Nor does the employer, in such a case, render himself liable to a greater amount than the stipulated sum, by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily (from the nature of the work) be aware, that the alteration will increase the expense; *Lovelock v. King*, 1 *M. & R.*, 60. But if a man contract to work by certain plan and for a fixed sum, and that plan be so entirely abandoned that it is impossible to trace the contract, and say to which part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no such contract had been made; *Pepper v. Burland*, *Peake's R.*, 103. But the measure of damages, where a person contracts to perform work according to a specification at prices therein mentioned, and finishes the work in a way different to and less expensive than that agreed on, is not the actual value of the work done, but only the amount of the agreed price, minus such a sum as it would take to complete the work according to the specification; *Thornton v. Place*, 1 *M. & Rob.*, 218; and in all cases of 'extra work' the original agreement, if in writing, must be produced duly stamped. See *Buxton v. Cornish*, 13 *L. J.*, *Ex.*, 91.

If no price has been fixed, the plaintiff in that case must call witnesses to prove the value of the work.

The refusal of a workman to deliver work which he has performed, except on payment of a large and exorbitant sum of money, does not preclude him from suing for and recovering a reasonable price. *Hughes v. Lenny*, 5 *M. & W.*, 183.

Defence.—As to defences in general, see *ante*, p. 29 to p. 107.

Whether the plaintiff founds his claim on an agreement by the defendant to pay a specific sum, or simply seeks to recover the value of the work, the defendant may reduce the claim by showing that the work or materials were of an insufficient and inferior description and value; *Chapel v. Hicks*, 2 *C. & M.*, 219; and the demand may be altogether defeated by shewing that the work is totally inadequate to answer the purpose for which it was undertaken to be performed. *Duncan v. Blundell*, 3 *Stack. R.*, 6; *Farnsworth v. Garrard*, 1 *Camp.*, 38.

EVIDENCE FOR THE PLAINTIFF IN AN ACTION FOR WAGES.

In an action for wages the plaintiff must prove the contract or *retainer*, express or implied; the length of time of service; and the amount of wages due. *Roscoe*, 6th edit., p. 262.

Contract.—A contract for the hire and service of an agent, clerk or servant, need not be in writing, unless the retainer is, by the terms of the bargain, to extend beyond a year, in which case a written agreement is necessary, in reference to the 4th section of the Statute of Frauds, 29 Car. II., c. 3; *Bracegirdle v. Heald*, 1 B. & Ald., 722; *Giraud v. Richardson*, 15 L. J., C. P., 180. But it seems that a hiring for a year, or an implied yearly hiring, need not be reduced into writing; *Beeston v. Collyer*, 4 Bing., 309. It is to be observed, that if the plaintiff has actually rendered the services for which he was engaged, he is entitled to some remuneration, and the defendant cannot set up as a defence that the original hiring was for more than a year and was not in writing; and therefore it is in general only where the plaintiff seeks to recover on a contract for wages, the defendant not having actually received the services, that the question whether a written agreement was necessary arises. Where, however, the contract is in writing, it cannot be varied by verbal evidence; see *Giraud v. Richardson*, *supra*, and *ante*, p. 17. It may, however, be explained—thus, when a theatrical engagement is for “three years at a salary of 5*l.*, 6*l.*, and 7*l.*, in those years respectively,” being ambiguous, parole evidence is admissible to shew that, under such a contract, it is the theatrical usage to pay a proportion of salary for those nights only during which the theatre was open for performance. *Grant v. Maddox*, 16 L. J., Ex., 227.

Agreements for the hire of any labourer, artificer, manufacturer, or menial servant, are exempted from stamp duty.

In the case of a domestic or menial servant, it appears that a general hiring, that is, a hiring without any engagement as to the duration of the service, is, in point of law, a hiring for a year, and it will be implied or construed to be a hiring, on the terms that either party might determine the engagement upon giving a month's warning; and that there is in such a case a tacit promise by the master to pay a month's wages, if he dismiss his servant without such notice; *Fawcett v. Cash*, 5 B. & Ad., 904. A gardener is a domestic servant within this rule, although he has in addition to his yearly wages, a separate house to live in and

under-gardeners subject to his directions. *Nowlan v. Ablett*, 2 C. M. & R., 54.

A general hiring of a servant in husbandry, is a hiring for a year, and not determinable at any time during the year on notice; *Lilley v. Elwin*, 17 L. J., Q. B., 132; and in all probability the general engagement of a clerk would be deemed to be a yearly hiring, except in cases in which there prevailed a custom in the particular business in reference to which he was retained, to discharge clerks so employed, without warning, or on giving any particular notice; *Chitty on Contracts*, 3rd edit., p. 577. And in all cases the question whether a general hiring is for a year is not a rule of law, but a question depending upon the facts of each particular case; *Baxter v. Nurse*, 13 L. J., C. P., 82. The rule as to a month's wages or a month's warning does not apply to other than domestic servants. *Beeson v. Collyer*, 4 Bing., 309; *Smith v. Haward*, 7 A. & E., 544. Where the plaintiff entered as warehouseman into the service of the defendant, who engaged to pay him at the rate of 12l. 10s. per month for the first year, and to advance 10l. per annum until the salary was 180l.; it was held that this was at all events a hiring for one year at least; *Fawcett v. Cash*, *supra*; and a contract to serve as a reporter to a newspaper for one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties shall respectively please, is yearly service so long as it lasts, and cannot be terminated except at the end of any current year; *Williams v. Byrne*, 2 N. & P., 139. So where a clerk was appointed at a salary of 200l. per annum, and was paid several sums of 50l. each soon after the usual quarter days of the year, it was held that this was evidence of a contract at a salary of 200l. a year payable quarterly; *Ridgway v. Hungerford Market Company*, 3 A. & E., 171; *Chitty on Contracts*, 3rd edit., p. 578.

The presumption that a general hiring is a hiring for a year, may be rebutted by evidence, shewing that such was not the intention of the parties; *Bayley v. Rimmell*, 1 M. & W., 506; and in all cases it is a question for the jury. Where several witnesses proved a custom that a general hiring in the case of editors of reviews was a hiring for a year, but there was no proof of such custom as to the editors of a newly commenced review, it was held that it was not to be inferred from such usage that a general contract with an editor of a new publication was for a year, but that it was a question for the jury. *Baxter v. Nurse*, 13 L. J., C. P., 82.

In an action by an assistant-surgeon for wages, it was proved that the plaintiff had served the defendant for nearly half a year, and that payments were made during that time on account of wages, but not according to any yearly amount, or at any definite period of the year. The plaintiff afterwards became ill and was taken to an hospital, and after his recovery did not return to his employment, nor did the defendant require him to do so; it was held that there was no evidence of any hiring for a year, and that the plaintiff was entitled to recover wages on a *quantum meruit* for the time he served. *Bailey v. Rimmell*, 1 M. & W., 506.

Where the plaintiff hired himself to the defendant to work in a colliery, under a written agreement, which stipulated that when the pit of the colliery should be off work, the plaintiff should continue the servant of the defendants, and subject to their orders and directions, and liable to be employed by them as they should think fit, and should do and perform a full day's work on every working day; it was held that, under such an agreement, the defendants were not bound to employ the plaintiff on all reasonable working days. *Williamson v. Taylor*, 13 L. J., 81; see also *Pilkington v. Scott*, 15 L. J., Ex., 329.

Where a person entered into the service of another under the following contract: "I hereby agree to enter into your service as a weekly manager, to commence from next Monday; the amount of payment I am to receive I leave entirely to you;" it was held (*dis. Parke*), that he was entitled to recover a reasonable remuneration for the services performed by him. *Bryant v. Flight*, 5 M. & W., 114; see *Owen v. Bowen*, 4 C. & P., 93.

When the contract is entire and in force, the servant cannot sue until the period when the wages are payable, as where wages are payable yearly the servant cannot sue at the expiration of a quarter for any part, see *Giraud v. Richardson*, 15 L. J., C. P., 180; but where a servant is wrongfully dismissed before the expiration of the period for which he was hired, he may treat the contract as rescinded, and may immediately sue, on a *quantum meruit*, for the work he actually performed, but in that case, as he sues on an implied contract arising out of actual services, he can only recover for the time that he actually served; or he may wait until the termination of the period for which he was hired, and may then sue for his whole wages; but in that case, and whenever the plaintiff seeks to recover wages for a period when he did not actually serve, the plaintiff should be special for non-payment of wages; see *Fewings v. Tindal*,

17 L. J., *Ex.* 18. A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent within the year, recover salary *pro rata*, without any express agreement to that effect; *Thomas v. Williams*, 1 A. & E., 485; but whether he is so entitled is a question for the jury. *Lamburn v. Cruden*, 2 M. & G., 253.

Length of service and amount of wages due.—These points in the plaintiff's case will be proved, either by the special contract, if there be one, or by evidence of the actual service during the time sued for, and proof of what such services were reasonably worth. The plaintiff himself will of course be the principal witness as to the length of service, but the amount due to which he is fairly entitled, in the absence of any fixed sum, should be shown by the evidence of disinterested witnesses.

It is to be observed that the County Courts Act, 9 & 10 Vict., c. 95, s. 64, enacts, that it shall be lawful for any person under the age of twenty-one years, to prosecute any suit in any court holden under this Act, for any sum of money not greater than twenty pounds, which may be due to him for wages or piece-work, or for work as a servant, in the same manner as if he were of full age.

EVIDENCE FOR THE DEFENDANT.

Misconduct of the plaintiff.—If a servant misconduct himself he may be discharged without warning before the expiration of the period for which he was hired, and is not entitled to any wages from the day he is so discharged, if they had not then accrued due. And when the payment is to be quarterly, or yearly, or at fixed periods, and the servant improperly leave his master, or is guilty of misconduct during the currency of such quarter, he is not entitled to wages for any part of such quarter, &c., even to the day he quits, as there can be no apportionment of an entire sum under such circumstances; *Lilley v. Elwin*, 17 L. J., Q. B. 132; *Hutman v. Boulnois*, 2 C. & P., 510; *Atkin v. Acton*, 4 C. & P., 208. In order to justify the immediate discharge of a yearly servant, there must be proved against him moral misconduct, pecuniary or otherwise, wilful disobedience of orders, or habitual neglect, sleeping out at night without leave, &c. *Calls v. Bronacker*, 4 C. & P., 518; *Robinson v. Hindman*, 3 Esp., 235; *Lilley v. Elwin*, 17 L. J., Q. B., 132; *Spain v. Arnott*, 2 Stark., N. P. C.

Where a female servant, after asking her master's permission to go away for a night, and was refused permission,

went without leave, it was held that the master was justified in dismissing her, and that she was not entitled to a month's wages; and that it was no lawful excuse for her absence, that her mother was seized with sudden and violent illness, and was in imminent peril of death, and believing herself likely to die, had requested her daughter to visit her, and the master refusing his leave, she went without, whatever might be the moral duty of the master on such an occasion; *Turner v. Mason*, 14 L. J., Ex., 311; so the refusal of a servant in husbandry to work after half-past six, instead of until eight o'clock, on one occasion, because beer was not supplied to him. *Lilley v. Elwin*, 17 L. J., Q. B., 132.

There are cases no doubt in which a servant would be justified in leaving his master's house contrary to his orders; such as infectious fever, or a female servant in danger of violence from her master, for in those cases there would be no legal disobedience, because it is an unlawful order to direct a servant to continue where she is in danger of violence to her person, or infectious disease; see judgments of *Alderson, B.*, and *Rolfe, B.*, in *Turner v. Mason*, *supra*. Giving the plaintiff in custody on a charge of felony which is afterwards abandoned, is no dissolution of a contract of hiring, and the servant in such case if dismissed is entitled to a month's wages. *Smith v. Kingsford*, 3 Scott, 279.

The fact of a servant's inducing his master's apprentice to run away; *Turner v. Robinson*, 5 B. & Ad., 789; or of a clerk feloniously assaulting his employer's female servant; *Aitkin v. Acton*, 4 C. & P., 208; or of a clerk having made fraudulent entries in his account books; *Baillie v. Kell*, 4 Bing., M. C., 638, have been held justifiable causes for an immediate dismissal by the master. So if a person hired on an annual contract as clerk, to conduct an establishment for his master, set up a claim to be a partner, although in a respectful manner, and *bonâ fide*, it is sufficient cause for the master to dismiss him without notice; *Amor v. Fearon*, 9 A. & E., 548; and if the acting manager of a theatre conduct himself in such an improper manner as to make it injurious to the interests of the theatre to keep him, the lessee or proprietor may lawfully dismiss him. *Lacy v. Obaldiston*, 8 C. & P., 80. *Chitty on Contracts*, 3rd edit., p. 580.

The defendant may shew a discharge by a magistrate, under the Stat. 4 Geo. IV., c. 34, s. 3, which if made upon the complaint of the defendant, is equivalent to a discharge by him; but it seems that the misconduct of the plaintiff

justifying the discharge must be proved. *See Lilley v. Elwin*, 17 L. J., Q. B., 132.

The refusal of the wife to work is no ground for the discharge of the husband and wife from service. *Jacquot v. Bourra*, 7 Doubl., P. C., 348.

When a justifiable cause of dismissal exists, it is sufficient to prevent the servant's recovering wages, though he might not in fact have been dismissed upon that ground; and it is not necessary that the cause relied on in answer to an action for wages should have been stated at the time of dismissal. *Ridgway v. Hungerford Market Company*, 3 A. & E., 171. *Chitty on Contracts*, 3rd edit., p. 580.

Payment.—In regard to the defence of payment, it seems that where a domestic servant has left his master for a considerable period, it will in general be presumed that his wages have been paid, where there is no admission that they are in arrear, or any circumstance to rebut the presumption; *Sellen v. Norman*, 4 C. & P., 80. The same presumption arises in the case of workmen or labourers on proof that it was customary for the employer to pay his men weekly, &c. *Lucas v. Novisilieski*, 1 Esp., R., 296, see as to payment generally, *ante* p. 50.

Set-off.—The master cannot deduct from the wages the expenses of a medical practitioner sent for by him to attend his servant, unless it were specially so agreed; *Sellen v. Norman*, 4 C. & P., 80; and if the servant were under age, the master cannot deduct from, or set-off against the wages, advances or payments made by him to or for the servant, for articles not being necessities for the latter; *Hedgley v. Holt*, 4 C. & P., 104. Nor can the master deduct anything for goods supplied to the servant falling within the provisions of the Truck Act, 1 & 2 Wm. IV., c. 37, (prohibiting the payment of wages except in money), where the master is a trader within that Act. *See Chawner v. Cummins*, 15 L. J., Q. B., 161; see as to set-off in general, *ante* p. 72.

As to other defences, see *ante* p. 29, to p. 107.

EVIDENCE IN ACTIONS BY APOTHECARIES AND SURGEONS.

In an action by an apothecary for medicines and attendance, he must, in addition to the proof of the attendance, and supply of the medicines, and the reasonableness of the charge, prove his qualification to sue.

By the 55 Geo. III., c. 194, s. 21, as explained and amended by the 6 Geo. IV., c. 133, s. 5, it is provided, that no apothecary shall be allowed to recover any charges

claimed by him, in any court of law, unless such apothecary shall prove on the trial that he was in actual practice as an apothecary on the 1st of August, 1815, or that he has obtained a certificate to practise as such from the Apothecaries Company.

Proof of certificate.—Where the plaintiff was not in practice before 1815, he must produce the certificate granted to every member passing the examination of the Company, and must prove its genuineness. The statute enacts that proof of the seal of the Company is evidence, and as the plaintiff is a competent witness, he can prove that he received it from the Court of Examiners at the Hall of the Company; and if he can prove the handwriting of any one of the signatures attached, these facts will constitute sufficient *prima facie* proof; *Walmsley v. Abbot*, 3 B. & C., 218. If however the plaintiff cannot prove as much, he should give notice to the defendant to admit the genuineness of the certificate on the trial, in order that if he refuses to do so, the plaintiff may be entitled to the cost of a witness to prove the necessary fact.

Proof of practice before 1815.—If the plaintiff is not a member of the Apothecaries Company, and relies on having been in practice on or before the 1st of August, 1815, he must prove that he practised at that time the general duties of an apothecary, viz., making up medicines in that character, prescribed by himself, or by a physician, or other person; acting as a chemist or druggist, or merely as a surgeon-accoucheur will not be sufficient; or merely administering medicines; *Thompson v. Lewis*, 3 C. & P., 483; *M. & M.*, 255; *Woodward v. Bell*, 6 C. & P., 377. Although the plaintiff may be examined as to the fact of his practising before 1815, he should, where it is disputed, confirm his statement by the evidence of other witnesses.

In respect to surgeons, however, no qualification is necessary to entitle them to sue for services as surgeons, except within the City of London, or seven miles round, where a license from the College of Surgeons is necessary; and even there it is incumbent upon the defendant if he intends to avail himself of the plaintiff being unlicensed, to prove that fact. *Gremara v. Le Clerc Bois Valon*, 2 Camp., 144.

But a surgeon, not having a certificate from the Apothecaries Company, cannot charge for his attendance, or for administering medicine, except in cases within his own department; he cannot therefore recover for attending a patient in the typhus fever; but whatever medicine may be necessary for the purpose of removing a complaint, which it is the duty of a surgeon to attend to and cure, he

may perhaps be allowed to recover, but he is not entitled to recover, unless the medicine he administers be clearly auxiliary to his duty as a surgeon, whose province, strictly speaking, is confined to the reduction and cure of fractures, and other injuries affecting the limbs, or such external ailments as may require the operation of the knife, and cannot be extended to internal complaints, or local diseases; *Allison v. Haydon*, 4 Bing., 619. But though a surgeon attends patients requiring surgical aid, and also dispenses medicines to them, not being certificated as an apothecary, he may recover for his surgical advice, though he may have no remedy for such medicines; *Simpson v. Balf*, 4 Tyr., 325. If the plaintiff be a surgeon and apothecary, or apothecary only, he may, besides his charges for medicines, recover reasonable charges for attendances. *Morgan v. Hallen*, 8 A. & E., 489. *Handley v. Hewson*, 4 C. & P., 110.

It is to be observed that a physician cannot in general maintain an action for his fees; neither can a surgeon who assumes the character of a physician, but has no diploma. *Lipcombe v. Holmes*, 2 Camp., 441.

Defence.—If the defendant has received no benefit in consequence of the plaintiff's want of skill, the latter cannot recover; *Kannen v. M'Mullen, Peake*, 59; but if an operation, which might have been useful, has merely failed in the event, the plaintiff is nevertheless entitled to charge; but if it would have been useful in no event, he has no claim on the patient; *per Alderson, J., in Hill v. Featherstonhaugh*, 7 Bing., 574. Although a person who professes to cure disorders in a specified time, and induces the defendant to employ him by false and fraudulent representations of his skill, and does not succeed in his cure, cannot recover for medicines; the remuneration of a regular practitioner, who has used due care and diligence, does not depend on his effecting a cure; *Hope v. Phelps*, 2 Stack, 480. *Roscoe*, 6th edit., p. 262.

ACTION BY AN ATTORNEY.

In an action upon an attorney or solicitor's bill, the plaintiff must prove, 1st, the contract or *retainer* by the defendant; 2nd, that the business was done, and 3rdly, the delivery of the bill one month before the commencement of the action.

The retainer.—This may be proved by showing that the defendant attended at the plaintiff's office and gave directions, and as the plaintiff is a competent witness, the

difficulty that [sometimes attends the proof of this fact is avoided.

That the business was done.—This also may be proved by the plaintiff, his clerk, or other agent, who can speak to the existence of the causes, and the business in respect of which the charges are made, and can prove the main items, without proving every item to have been done.

The delivery of the bill.—The stat. 6 & 7 Vict., c. 73, sec. 37, enacts, that no attorney, &c., shall commence any action for the recovery of any fees, charges, or disbursements, for any business done by such attorney, &c., until the expiration of one month after such attorney shall have delivered unto the party to be charged therewith, a bill of such fees, &c., and which bill shall either be subscribed with the proper hand of such attorney, &c., or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill. The statute is retrospective, applying to business done before as well as since the statute. *Brooks v. Beckett*, 16 L. J., Q. B., 178.

As it has been decided that the 9 & 10 Vict., c. 95, s. 67, which enacts, that no privilege except as therein mentioned, shall be allowed to any person to exempt him from the jurisdiction of the County Courts, does not affect or take away the privilege of attorneys to sue in the superior courts, and as consequently an attorney who sues in the superior courts, although for a sum not exceeding 20*l.* is entitled to his full costs (*Lewis v. Hance*, 17 L. J., Q. B., 172; *Jones v. Brown*, *Id.*, *Ex.*, 163), the County Courts will seldom be resorted to for the recovery of such demands, and consequently it is unnecessary to enter further into the nature of the evidence in their support*.

CONTRACTS RELATING TO MONEY AND SECURITIES FOR MONEY.

EVIDENCE WHERE THE ACTION IS NOT FOUNDED ON A WRITTEN SECURITY.

MONEY LENT.

In an action for money lent, the plaintiff will have to prove the loan of his money. To establish a loan it is not

* The above cases were decided since the previous part of this work went to press; but it seems to be still a matter of doubt whether attorneys are privileged from being sued in the County Courts. See *ante*, p. 49.

sufficient merely to prove the payment of money to the defendant, for in such case the presumption of law is that the money is paid in liquidation of an antecedent debt; *Welch v. Seaborn*, 1 Stark, 474, and the mere fact of a person drawing a cheque, in favour of another, is not evidence of a loan; *Pearce v. Davis*, 1 M. & M., 365; but see *Boswell v. Smith*, 6 C. & P., 60; but if the plaintiff can shew any money transactions between the defendant and himself, from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the passing of the money, will be evidence of a loan; *Carey v. Gerrish*, 4 Esp., 9. *Roscoe*, 6th edit., p. 290; and as the plaintiff is a competent witness, to establish a *prima facie* case, any difficulty on this point is removed.

If a parent advances money to a child, it is presumed to be by way of gift; *Hick v. Keats*, 4 B. & C., 71. If the defendant were in fact the borrower, although the money were delivered by the plaintiff to another person at the defendant's request, or was advanced to the defendant's wife, the plaint should nevertheless be framed as for money lent to the defendant; and where the defendant gave a memorandum, whereby he acknowledged the receipt from the plaintiff of a sum of money on the behalf of E. F., an infant, and where the defendant promised to be accountable for such sum on demand; it was held that the memorandum was evidence to support an action against the defendant for money lent to him; *Harris v. Huntback*, 1 Burr, 373; but an action for money lent cannot be maintained if the money were not lent to the defendant, and upon his credit in the first instance, but was lent and actually delivered to another person, who was to become primarily liable to the plaintiff; so that the defendant's undertaking was merely collateral and conditional; that is, to pay if the party receiving the money did not; *Mariot v. Lister*, 2 Wils., 141. In that case the action and plaint should be framed upon the guarantee: see *post*, *Actions on Guarantees*. If, however, two or more joint contractors or partners borrow money, the credit being given to all equally, although the money was actually delivered to one only, the plaintiff may sue all jointly, or any one of them, for money lent.

On the other hand, where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he proves distinctly that the loan was in reality intended to be his, and was received as such. *Chitty on Contracts*, 3rd edit., p. 590.

Where money is generally lent upon, or secured by a deposit of goods, this will not deprive the lender of his remedy by action against the borrower, without returning the goods; and to discharge the person of the borrower, there must be a special agreement to stand to the pledge only. *Ibid.*

The plaintiff may give in evidence a promissory note made by the defendant and payable to the plaintiff, or a bill of exchange accepted by the defendant in favour of the plaintiff, in support of a plaint for money lent; but where the plaintiff sues upon that security, it is more explicit to frame the plaint accordingly; (*see post, Actions on Promissory Notes, &c.*); but where the plaintiff holds the defendant's I. O. U. for the money, the plaint is properly described as for money lent, of which the I. O. U. will be evidence, as an acknowledgment of the debt rather than as a security constituting a distinct cause of action. It may be stated here that an I. O. U. does not require any stamp, whatever may be the amount, provided no terms are introduced in it, constituting an agreement or promissory note.

Defence.]—As to defences in general, *see ante*, p. 29 to p. 107.

Illegality.]—Money lent to and applied by the borrower for the express purpose of accomplishing an illegal object cannot be recovered, and therefore money lent to the borrower for the purpose of gambling or playing at an illegal game, is not recoverable. *McKinnell v. Robinson*, 3 M. & W., 434.

MONEY PAID.

The plaintiff in an action for money paid to the defendant's use, must prove, 1. The payment of money by him; 2. That it was paid at the request of the defendant and to his use. *Roscoe*, 6th edit., p. 288.

The payment of money.]—It is necessary that money should have been paid or expended by the plaintiff, therefore where the plaintiff's goods are sold under a distress by the defendant's landlord for rent due by the defendant, an action for money paid is not sustainable, for no money passes from the plaintiff. *Taylor v. Higgins*, 3 East, 169.

The fact of payment may be proved by the evidence of the plaintiff, of the party to whom it was paid, or by receipts, &c.

The defendant's request.]—It is necessary that the defendant's expressed or implied request to the plaintiff to pay the money for his use should be shewn by the plaintiff.

It is not sufficient to prove merely the defendant's liability to a third person, and the plaintiff's discharge of such responsibility. It is necessary to establish that the plaintiff did so at the request of the defendant, or that the act was subsequently recognised by him,—for it is a clearly established principle that no action can be brought on the voluntary and unasked payment of the debt of another person, and that one man cannot become the creditor of another without his knowledge or consent; *Alexander v. Vane*, 1 M. & W., 511; but there are instances in which, though the defendant did not in fact request the plaintiff to make the payment for him, yet the law will imply such request, and admit no evidence to the contrary. Thus where the plaintiff is compelled to make a payment of the defendant's legal debt, in consequence of his neglect or omission to discharge it, as when the plaintiff pays rent due from the defendant in consequence of the plaintiff's goods being duly distrained for such rent; *Exall v. Partridge*, 8 T. & R., 308; and it appears to be unnecessary for the plaintiff in such case to resist the distress (if valid) by replevying or bringing an action, in order to entitle him to re-imbursement from the tenant; see *Carter v. Carter*, 5 Bing., 406. But the tenant of part of a premises cannot recover from the tenants of the other parts holding at distinct rents, money paid by him for the whole rent, although under a threat of distress; *Hunter v. Hunt*, 14 L. J., C. P., 113. An executor who pays legacies in full, and afterwards pays the legacy duty, may recover the amount of the latter as money paid to the use of the legatee; *Foster v. Ley*, 2 Bing., N. C., 269. So the indorsee of a bill of exchange, who being sued, paid part of the amount to the holder who had recovered judgment against the acceptor, may recover the amount against the latter; *Pownall v. Ferrand*, 6 B. & C., 439. Where a husband went abroad and left his wife, who died in his absence, it was held that a relative who paid suitable expenses of her funeral, might recover from him the money laid out; *Jenkins v. Tucker*, 1 H. Bl., 90. If a carrier by mistake deliver to B goods consigned and sold to C, and B appropriate the goods to his own use, and the carrier, on demand, pay C their value, he may recover the amount from B, as money paid to his use. *Brown v. Hodgson*, 4 Taunt., 189.

So where a person becomes surety for another at his request, the law implies a promise by the latter that he will indemnify the surety and repay him whatever he may be compelled to pay the creditor, and a person who accepts or indorses a bill of exchange, or indorses a note, without

value, for the accommodation of another person, is entitled, on paying the instrument, to recover the amount from the party for whose benefit he thus becomes responsible; *Chitty on Contracts*, 3rd edit., p. 592, 598; and where the plaintiff who had compounded with his creditors privately, gave the defendant a promissory note for the full balance of his debt, which the defendant in violation of the agreement negotiated, and the plaintiff had to pay the amount, it was held that the plaintiff might recover it from the defendant as money paid to his use. *Horton v. Riley*, 13 L. J., Ex., 81.

Payment to the defendant's use.—To sustain this action, it is in general necessary that the money paid should have been at the time a debt for which the defendant was originally or primarily liable to the third party; but where money has been paid at the request of the defendant, either express or implied, it may be recovered as money paid to the use of the defendant, though paid in satisfaction of a claim against the defendant, which could not have been enforced at law; *Pawle v. Gunn*, 4 Bing., N. C., 448; and the action is maintainable in every case in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, with an undertaking, express or implied, to repay the amount; and it is immaterial whether the defendant is relieved from a liability, by the payment, or not; *Brittain v. Lloyd*, 15 L. J., Ex., 43. But one partner cannot sue another for money paid on account of a partnership transaction. See *Sharpe v. Cummings*, 14 L. J., Q. B., 10; and *ante*, p. 38.

CONTRIBUTION.

The County Courts Act, 9 & 10 Vict., c. 95, s. 68, enacts, "That where any plaintiff shall have any demand recoverable under this Act against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process, and judgment may be obtained and execution issued against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued, or may not be within the jurisdiction of the Court, and every such person against whom judgment shall have been obtained under this Act, and who shall have satisfied such judgment, shall be entitled to demand and recover in the County Court under this Act contribution from any other person jointly liable with him."

Independently of the above enactment, where there are several defendants (not partners) in an action on contract, and the plaintiff recovers judgment against them, and one

pay the whole demand recovered, the law gives him an action for money paid against the others to recover contribution; and the same where one of several joint or joint and several debtors is sued alone; *Blachett v. Weir*, 5 B. & C., 387. So where several persons are sureties, and one is compelled to pay the whole, he may recover from each of his co-sureties a rateable proportion of the money so paid. *Cowell v. Edwards*, 2 B. & P., 268; *Deering v. Winchelsea*, *id.*, 270; *Davis v. Humphreys*, 6 M. & W., 168; and the co-surety may pay the debt, when liable, without waiting for a demand or an action, and then sue for contribution; *Pitt v. Pursford*, 8 M. & W., 538. But if the surety from whom contribution is claimed became bound in that character, at the request of the surety who seeks to recover it, he is not liable; for the implied promise is in such cases negatived; *Turner v. Davis*, 2 Esp. R., 478; nor can a surety recover contribution where he holds by way of indemnity monies of the principal exceeding the amount he has been called upon to pay. *Geipel v. Swinden*, 13 L. J., Q. B., 113.

There cannot, however, (except under the above section of the County Courts Act), be any claim for contribution between partners; *Sadler v. Nixon*, 5 B. & Ad., 936; or in general for damages recovered against one of several persons in an action for tort, where the person sued was an actual party to the trespass, &c. *Merryweather v. Nixon*, 8 T. R., 186; *Pearson v. Skelton*, 1 M. & W., 504.

In an action for contribution, whether under or independently of the above section, the plaintiff must prove the joint liability of the defendant with himself to the third party to pay the money; and the fact of payment by the plaintiff.

The original liability of the defendant may be shewn by proof of the contract, express or implied, as in other cases.

The payment of the debt by the plaintiff when under a judgment of the County Court, will be evidenced by proof of the entry of the judgment and payment on execution thereon in the office-book of the County Court, of which entries the book, or a copy of such entries, bearing the seal of the Court and purporting to be signed and certified as a true copy by the clerk of the Court, is evidence of such entries without further proof. 9 & 10 Vict., c. 95, s. 111.

If the debt were paid under a verdict or judgment of one of the superior courts, the proper evidence of it is an examined copy. In an action for a moiety of the money paid by the plaintiff under a verdict recovered in a suit against the plaintiff and defendant jointly, the *Nisi Prius* record

and *postea* has been held to be evidence of the verdict and damages in the former suit, without proof of the judgment, because the plaintiff might pay the debt at that stage of the cause to save expense, but not evidence of the costs of suit. *Foster v. Compton*, 2 Stark., 365.

If the debt is paid without legal process, then the plaintiff must prove the payment by a receipt, or by the evidence of himself and the party to whom it was paid, who are both competent witnesses to prove the case.

In an action for contribution the plaint may be entered as for money paid to the defendant's use, and this appears to be the correct mode of describing the claim.

MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff must prove the receipt of money by the defendant to the use of the plaintiff.

It would be beyond the limits of this work to enter fully into all the various cases in which this action can be maintained, and a concise enumeration of some of the circumstances, upon proof of which the plaintiff will be entitled to recover, must suffice.

Money received by agent.—This is the proper action to be adopted to recover money received by the plaintiff's agent on the sale of goods for him, and if an agent refuses to account for goods delivered to him for sale, it is to be presumed, after a reasonable time, that he has sold them and received the proceeds in money; *Hunter v. Welsh*, 1 Stark., 224. In general an agent must account to his principal, and in an action brought by him cannot set up the right of a third person; *Nicholson v. Knowles*, 5 Mad., 47; *Croeskey v. Mills*, 1 C. M. & R., 298; *White v. Bartlett*, 9 Bing., 378; and the agent of a party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction brought against him by his principal. *Tenant v. Elliott*, 1 B. & P., 3.

If A pays B money to be applied to a particular purpose, which B neglects to do, A may recover it back in this form of action; *Parry v. Roberts*, 3 A. & E., 118; and where the plaintiff abandons the purpose for which money was deposited with the defendant, he may sue for money had and received; *Baird v. Robertson*, 1 M. & G., 981. Where B, the country attorney of the plaintiff, sent a sum of money to the defendants, who were his London agents, to be paid to C on account of the plaintiff, and the defendants promised B to pay the money according to his directions,

but afterwards, being applied to by C, refused to pay it, claiming a balance due to themselves from B on a general account between them, it was held that an action for money had and received would not lie against the defendants at the suit of the plaintiff, there being no privity of contract. *Cobb v. Becke*, 14 L. J., Q. B., 108.

An agent who has paid money over pursuant to the directions of the party depositing it with him, cannot be sued by a third person who claims it, but of whose title the agent had no notice; *Buller v. Harrison, Comp.*, 565; *Horsfall v. Handley*, 8 Taunt., 136; but otherwise if he pays it over after notice that the right to it is disputed; *Edwards v. Hodding*, 5 Taunt., 815; and until there has been a change of circumstances by his having paid over the money to his principal before notice, or done something equivalent to it, he remains liable; *Cox v. Prentice*, 3 M. & Sel., 344. In some cases where an agent receives money to pay over to a third person, he may be sued by the latter, but in general he continues to be accountable to his principal until he has entered into some binding engagement with that third person to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received, there being no privity between them; *Bawn v. Husband*, 4 B. & Ad., 611; *Williams v. Everett*, 14 East, 582; *Lilly v. Hays*, 5 A. & E., 548; *Calland v. Lloyd*, 6 M. & W., 26; and the mere bearer of money from one person to another cannot be sued. *Coles v. Wright*, 4 Taunt., 198.

Where an attorney's clerk, in the absence of his master, received money due to the plaintiff, one of his master's clients, and gave a receipt, "B for Mr. J.," and his master never returning, the clerk refused to pay over the money to the plaintiff; it was held that no action lay against the clerk; *Stephens v. Badcock*, 3 B. & Ad., 354. Where a legacy having been left to the plaintiff, the defendant, who acted as agent for the executor, stated, in a letter to a third party, that he would remit the plaintiff's legacy in any way the latter might suggest, and he afterwards paid 24l. to the plaintiff, having deducted 6l. 17s. 6d. for his trouble and expenses, and afterwards sent him an account, stating the reason of the deduction, it was held that the plaintiff was not entitled to recover this sum in an action for money had and received. *Barlow v. Browne*, 16 L. J., Ex., 63.

When A was indebted to B, and B was indebted to C, and B gave an order to A to pay C the sum due from A to B as a security, on which C lent B a further sum, and the order was accepted by A, it was held that on A's refusal to

comply with the order, C might maintain an action for money had and received against him; *Israel v. Douglas*, 1 H. Bl., 239; *Wilson v. Coupland*, 5 B. & Ald., 228; *Walker v. Rostrom*, 9 M. & W., 411. It seems, however, that the agreement must be such, that the debt due from B to C is thereby extinguished; *Cuxon v. Chadley*, 3 B. & C., 591; and the debt transferred must also be a demand for money had and received; *Wharton v. Walker*, 4 B. & C., 163. And where by the consent of all parties, the defendant is to pay to the plaintiff a debt due from the defendant to a third person, A, who is the plaintiff's debtor, it lies on the plaintiff to shew that there was, at the time of the agreement, an ascertained debt due from the defendant to A; *Fairlie v. Denton*, 8 B. & C., 395; and in all cases the demand must be of a specific ascertained sum; *Harvey v. Archbold*, 3 B. & C., 628; although where the defendant is sued for the produce of goods wrongfully sold, it seems no direct evidence of the actual sum received is necessary. *Powell v. Rees*, 7 A. & E., 426.

Money in the hands of a stakeholder.]—A stakeholder, who has received money to abide a certain event, as in cases of wagers, may in some cases be sued by the party becoming entitled to it, for money received to his use; and in such case, where a stakeholder holds money in litigation between two persons, he is the party to be sued by the one entitled to it, and not the original debtor; *Ker v. Osborne*, 9 East, 378. In the case of a legal wager, no part of the money deposited can be recovered except by the winner; *Brandon v. Hibbert*, 4 Camp., 37; and see *Benbow v. Jones*, 14 L. J., Ex., 257; and if the event does not "come off," the money cannot be recovered except by the consent of all parties; *Emery v. Richards*, 15 L. J., Ex., 49. And it has been held that where the wager is illegal, the share of the deposit may be recovered from the stakeholder by the party depositing it, whether the wager or event has been decided on or not, or decided against him; provided he demand the return of the stakes before the money has been actually paid over after the event to the winner; *Hastelow v. Jackson*, 8 B. & C., 221; but this case is doubted in *Mearing v. Hellings*, 15 L. J., Ex., 168; and see *Thorpe v. Coleman*, 14 L. J., C. P., 260; *Allport v. Nutt*, *Ibid.*, 272; *Gatty v. Field*, 15 L. J., Q. B., 408; which decide that no part of the stakes can be recovered by the winner in an illegal wager or lottery.

Where the holder of a ticket in a Derby lottery sold it before the race, and the horse named in it was ultimately declared to be the winner, it was held that the purchaser

could not sue the stakeholder in an action for money had and received for the amount to which the holder of the ticket was, by the conditions of the lottery, entitled. *Jones v. Carter*, 15 L. J., Q. B., 96; and see *Black v. Siddaway*, *Ibid.*, 359.

An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him; *Dunoon v. Cafe*, 2 M. & W., 244; but if the auctioneer is to pay the deposit to the vendor, he is not liable to be sued by the purchaser, although the contract be abandoned and the auctioneer has returned part of the deposit without the consent of the vendor; *Hurley v. Baker*, 16 L. J., Ex., 273; and where the vendor's solicitor receives the deposit he is not liable, and the action should be brought against the vendor; *Burnford v. Shuttleworth*, 11 A. & E., 926. The deposit paid to an auctioneer on a purchase at a sale, announced to be "without reserve," may be recovered from the auctioneer, if the vendor employs a party to bid on his behalf, without giving notice of the fact. *Thornett v. Haines*, 15 L. J., Ex., 230.

An action for money had and received will not in general lie against a person who has received money to be applied in a particular way as long as he has the power to apply it as directed, and the trust still remains open. See *Edwards v. Bates*, 13 L. J., C. P., 156; *Bartlett v. Dimond*, 14 L. J., Ex., 372.

Money paid for a particular purpose which has not been carried out.—Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus, the subscribers of a company may recover from the directors subscriptions received by them for the purpose of laying out at interest, the directors having abandoned the scheme before any part of the money was so laid out, and in such case the directors cannot deduct any thing for expenses; *Nickels v. Crosby*, 3 B & C., 814. So the money paid for the purchase of shares in a joint-stock company, may, under similar circumstances, be recovered; *Kemson v. Saunders*, 4 Bing., 5; *Walstab v. Spottiswoode*, 15 L. J., Ex., 193; and see *Clarke v. Chaplin*, 16 L. J., Ex., 246; and the vendor of shares in a company, whose duty it is to obtain a transfer of them by the directors, in order to complete the transfer to the purchaser, may be sued by the latter for money had and received; *Leeman v. Lloyd*, *Wilkinson v. Lloyd*, 14 L. J., Q. B., 165. So money paid for the purchase of an annuity, the annuity being void through the default of the grantor. *Turner v. Browne*, 15 L. J., C. P., 223.

Money paid under a misapprehension of the facts.—Money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable, as money paid without consideration; *Bise v. Dickenson*, 1 T. R., 285; *Milnes v. Duncan*, 6 B. & C., 671. Where money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake of fact in the hurry of business; *Lucas v. Worswick*, 1 M. & Rob., 293; but where upon the settlement of an account between A and B, a balance was struck and paid by A to B, it was held that B was not entitled to recover as money had and received a sum which had been by mistake allowed upon such settlement as due to A, for no money was in fact paid by B to A. *Lee v. Merrett*, 15 L. J., Q. B., 289.

A payment made in *bonâ fide* forgetfulness of a fact formerly known to the plaintiff, may be recovered back, and it is not enough to disentitle the plaintiff that he might have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth; *Kelly v. Solair*, 9 M. & W., 54. But where money is paid with a knowledge of all the facts, but under a mistake of the law, it cannot in general be recovered. *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt., 143.

Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back; *per Le Blanc, J.*, *Cox v. Prentice*, 3 M. & Sel., 349. But if parties agree to abide by the weighing of any article at any particular scales, and in the weighing an error, not perceived at the time, takes place, from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable; *per Lord Ellenborough, C. J.*, *Ibid.* So a tenant who has paid rent to a landlord, and is afterwards ejected by a third person to whom he has to pay the rent over again, may recover the former sum. *Newsome v. Graham*, 10 B. & C., 234.

Where a person paying money upon a forged instrument has not been guilty of any want of that caution which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money paid by him, as money paid under a mistake; but where the party paying the money ought to

have ascertained or is bound to know that the handwriting is forged; or where, by his 'delay in discovering his mistake, he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. *Roscoe*, 6th edit., p. 293.

Money paid by necessity or compulsion.—Where a person has been obliged involuntarily to pay money, it may be recovered in this action, as where a party is in wrongful possession of goods and the plaintiff redeems them under an urgent necessity, by paying money to get rid of a greater evil; as where he has paid an exorbitant sum to redeem his goods from pawn, or a wrongful detention; *Astley v. Reynolds*, 2 *Str.*, 915; *Ashmole v. Wainwright*, 2 *Q. B.*, 837. As where they are in possession of the Sheriff, under a threat of sale, the plaintiff under protest pays the amount of execution, which is void; *Valpy v. Manley*, 14 *L. J.*, *C. P.*, 204; *Snowdon v. Davis*, 1 *Taunt.*, 359. So excessive and more than authorized charges for carriage of goods paid under protest, may be recovered in this action; *Parker v. Great Western Railway Company*, 13 *L. J.*, *C. P.*, 105; but an action for money had and received will not lie for money paid under an execution on a subsisting judgment, although it be alleged that the judgment was signed on a warrant of attorney obtained by fraud or duress, for a judgment and execution cannot be set aside in this action, but must be set aside previously; *De Medina v. Grove*, 15 *L. J.*, *Q. B.*, 287; see *the Duke de Cadaval v. Collins*, 4 *A. & E.*, 858. Money paid to a toll-keeper who exacts an illegal toll may be recovered in this action; *Parsons v. Blandy, Wightw.*, 22. So money from a Sheriff who has claimed and received a larger fee than he ought; *Dew v. Parsons*, 2 *B. & Ald.*, 568; and money paid to the steward of a manor for producing deeds and court rolls at a trial, for which he had charged extravagantly, and which the plaintiff paid through necessity and urgency, as he could not do without the documents; *Cartwright v. Rowley*, 2 *Esp.*, 723; but an excessive demand for the release of cattle distrained and impounded *damage feasant*, paid under protest but without any previous tender, cannot be recovered; *Gulliver v. Cosens*, 14 *L. J.*, *C. P.*, 214; and where an action is brought, and the defendant pays the demand "without prejudice," he cannot afterwards recover the money so paid; *Brown v. McKinally*, 1 *Esp.*, 279; nor where parties who might have made a valid resistance against a demand, pay the money without resistance, although under legal process; *Marriott v. Hampton*, 7 *T. R.*, 269; *Hamlet v. Richardson*, 9 *Bing.*, 644; or where parties have paid a

sum of money to settle a doubtful claim; *Atlee v. Backhouse*, 3 M. & W., 683; *Longridge v. Dorville*, 5 B. & Ald., 117; or even where a voluntary payment is made of an illegal demand, and the party knows the demand to be illegal, but makes the payment without an immediate and urgent necessity; *Fulham v. Down*, 6 Esp., 26 (n.) But money extorted from the plaintiff by the threat of prosecuting a penal action against him, may be recovered; *Unwin v. Leaper*, 1 M. & G., 747. Where the plaintiff gave the defendant a bill to secure him an undue preference over other creditors of the plaintiff, to induce him to sign a composition deed, which bill was afterwards voluntarily paid by the plaintiff, it was held that he could not recover the amount from the defendant as money had and received; *Wilson v. Ray*, 10 A. & E., 82; and see *Belcher v. Samborne*, 13 L. J., Q. B., 297; and *ante*, p. 197, *Money paid*. But assignees may recover money paid by a bankrupt to creditors receiving more in the *l.* than others; *Ellis v. Russell*, 16 L. J., Q. B., 428; or under a bill of sale amounting to an act of bankruptcy. See *Lindon v. Sharpe*, 13 L. J., C. P., 67; *Lackington v. May*, *Ibid.*, 153.

BALANCE OF PARTNERSHIP ACCOUNT.

The County Courts Act, 9 & 10 Vict., c. 95, s. 65, provides that the jurisdiction of the County Courts under that Act "shall extend to the recovery of any demand, not exceeding the sum of twenty pounds, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will."

The action for the balance of an unliquidated balance of a partnership account, will, it seems, only lie on a final balance of the partnership accounts, and not during the continuance of the partnership. *Tromorui v. Coupeland*, 2 Bing., 170; *Wilson v. Cutting*, 10 Bing., 436; see *ante*, p. 38.

In this action the plaintiff must prove, 1st, the partnership; 2nd, the supply of goods, the payment of money by him, the receipt of money by the defendant, or the like, upon which the plaintiff founds his claim; and 3rdly, the termination or dissolution of the partnership, entitling him to sue.

As to the proof of partnership in general, see *ante*, p. 116. The balance of the account will be shown by proof of the various items constituting the balance, according to their nature, and the plaintiff may prove any general acknow-

ACCOUNT STATED.

It is the constant practice in the superior courts to add to a declaration for ordinary demands, as for goods sold, money lent, &c., an allegation that the defendant is indebted to the plaintiff for money found to be due on an account stated between them. The object of doing so is, that where there has been an express acknowledgment of a debt by the defendant, the plaintiff may recover upon this acknowledgment, although he fail in proving part or the whole of the original cause of action. It is seldom that the plaintiff proves a formal statement of account between the parties, but simply a recognition of some previous liability, which the law tortures into an original cause of action. It is submitted that, at least in the generality of cases in which evidence is received in the superior courts under the count on an account stated, the Judge of the County Court would be justified in receiving it as evidence of the original demand; *see ante*, p. 12. Cases, however, occur in which the insertion of a claim on an account stated may be advisable, as, for example, in an action by the payee against the maker of a promissory note; if the plaintiff fails at the trial in proving the note from a defect in the stamp or otherwise, but the defendant has acknowledged the debt or promised to pay the amount, it might be contended that the plaintiff could not give evidence of this acknowledgment in a plaint founded on the note, as no evidence can be given of any demand or cause of action, except such as shall be stated in the summons; *see* 9 & 10 *Vict.*, c. 95, s. 75, *ante*, p. 12; an objection which the insertion of a claim on an account stated would preclude. Even in the case supposed, however, the acknowledgment is in fact rather of the original cause of action, goods sold, &c., or whatever it might be, in respect of which the promissory note was given.

ACTIONS RELATING TO SECURITIES FOR MONEY.

ACTIONS ON PROMISSORY NOTES.

- § 1. *Payee v. Maker.*
- § 2. *Indorsee v. Maker.*
- § 3. *Indorsee v. Indorser.*

EVIDENCE FOR THE PLAINTIFF IN AN ACTION BY THE PAYEE AGAINST THE MAKER OF A PROMISSORY NOTE.

In an action by the payee against the maker of a promissory note, the evidence for the plaintiff is in general extremely simple. He has merely to produce the note, duly stamped, and prove the defendant's signature.

Proof of handwriting where the signature is attested.—It very frequently happens that a witness attests the signature of a party to a promissory note. Where that is the case, the witness must be called, and evidence of other parties as to their belief of the handwriting cannot be substituted for the testimony of the attesting witness. The rule in all actions is, that the best evidence must be given that the case will admit of, and, of course, the evidence of a person who was present and saw the defendant write his name, and he put his own name to attest the fact, is better evidence than the mere belief of parties that the handwriting is that of the defendant. As, however, in actions in the County Courts a defendant is a competent witness, there can be no doubt that, if the plaintiff likes to rely on the evidence of the defendant, he may be examined, and the note put into his hands, and if he admits his handwriting that will be sufficient, and indeed the very best evidence of it. Unless, however, the plaintiff summons the defendant as a witness, he cannot rely on his attending at the trial, or that if he attends he will admit his signature. On the contrary, if the action be undefended, the defendant is rarely in attendance, and if defended, he is seldom willing to admit so important a part of the plaintiff's case as the signature. It will never be prudent, therefore, to rely on the defendant's evidence; and accordingly, the plaintiff should call the attesting witness before the Court.

An instrument purporting to be attested by a subscribing witness may be proved, as if there were no subscribing witness, where the name of a fictitious person is inserted

as the name of the attesting witness; *Fasset v. Brown, Peake*, 23; or where the person, who has put his name as attesting witness, did so without the knowledge or consent of the parties; *McCraw v. Gentry*, 3 *Camp.*, 232, 4 *Taunt.*, 220; or where the attesting witness, on being called, denies having any knowledge of the execution. *Grellin v. Neale, Peake*, 196; and other cases cited in *Phillips' Evid.*, 9th edit., vol. ii., p. 214.

Where attesting witness is dead, &c.]—If the witness who attested the defendant's signature is since dead, or is become insane, or is out of the jurisdiction of the Court, the plaintiff, upon proof of the fact, may give general evidence of the attesting witness' handwriting. The plaintiff must, however, prove the fact of the death, insanity, or residence out of the jurisdiction of the Court, of the attesting witness. It will not in general be sufficient merely to shew that the witness is unwilling or refuses to attend. Illness is not in general a sufficient reason for dispensing with the attendance of an attesting witness. The presence of a subscribing witness is not to be dispensed with on account of his blindness; *Orant v. Frith*, 9 *C. & P.*, 197; for though blind, the witness may recollect the particulars of the transaction.

Proof of the handwriting of attesting witnesses may be received where they cannot be found after strict and diligent inquiry. Such absence leads to the inference that the witness is either dead, or abroad, and out of the jurisdiction of the Court. Every case upon this subject must depend on its own peculiar circumstances.

If there are several attesting witnesses, the absence of all must be accounted for, before evidence of handwriting can be given; see *Cunliffe v. Sefton*, 2 *East*, 183. But when the absence of all the attesting witnesses is accounted for, it will be sufficient to prove the handwriting of one of them. *Adam v. Kerr*, 1 *B. & P.*, 360. See *Phillips on Evid.*, vol. ii., pp. 212, 214.

The plaintiff having accounted for the absence of the attesting witness, must proceed to prove his handwriting, for proof of the subscribing witness's handwriting, in the cases above cited, is evidence of the execution of the instrument by the party therein named, whose signature the instrument purports to bear; and for the purpose of proving the execution, that is, that the instrument produced was executed by the party so named, it will not be necessary to prove the handwriting of that party; see *Phillips, ut supra*, and cases there cited. The evidence to prove the handwriting of the attesting witness will be such evidence

as is given to prove the handwriting of the maker of the note where there is no attesting witness. *Vide, Infra.*

As above stated, proof of the attesting witness's handwriting is evidence of the making of the note by the party whose signature it purports to bear, but such proof is no evidence that the party signing is the same person as the defendant; and, accordingly, some evidence of identity will be necessary in addition, to connect the defendant with the instrument. *Nelson v. Whittal*, 1 B. & A., 21; *Middleton v. Sandford*, 4 Camp. 34; *Whitelocke v. Musgrove*, 1 Cr. & M., 521.

Proof of the defendant's signature, therefore, may be given with this view, and such proof would be decisive. But proof of the signature is not absolutely necessary in the case under consideration; and much slighter evidence will be sufficient; *Phillips' Evid., ut supra.* Evidence that the defendant was present when the note was prepared by the subscribing witness, would serve to connect him with the instrument; *Nelson v. Whittal*, 1 B. & A., 19. It is to be distinctly understood that evidence of the defendant's signature, given for the purpose of proving identity, will not dispense with the necessity of proving the handwriting of the absent attesting witness.

Proof of handwriting where there is no attesting witness.—Where there is no attesting witness to the defendant's signature, his handwriting may be proved by any person who has a knowledge of it, from having seen him write; *See ante*, p. 22.

General evidence that the signature to the note is in the handwriting of the party whom it purports to represent, is in most cases sufficient, without express evidence of the identity of such person with the defendant; *Roden v. Ryde*, 12 Law J., Q. B., 276; unless the signature be by a marksman; i.e., a person who cannot write and puts his mark; *Whitelock v. Musgrove*, 1 Cr. & M., 511; or the name be a very common one in the neighbourhood where the bill appears to be accepted. *Jones v. Jones*, 9 M. & W., 75.

Where note signed by agent or partner.—If the note is signed by the agent of a party on his behalf, the plaintiff must prove not only his handwriting, but also the authority of the agent to sign for his principal. For this purpose the agent may be called as a witness.

If the agent sign his own name, without shewing, unequivocally, that he signed merely as agent for his principal, he alone is personally liable, and may be sued upon it. So, if the note be signed by one of several partners in the name of the firm, it will bind the firm, provided it be drawn in

the usual name of the firm, on their account, and the trade of the partnership be such as may be presumed to require the signing of promissory notes; see *Kirk v. Blurton*, 9 M. & W., 284; *Norton v. Seymour*, 16 L. J., C. P., 100. And if one member of a firm draw a promissory note, "I promise to pay," &c., and sign, "for self and partners," his own name: the holder must treat it as the joint note of all, and cannot sue the party signing alone. *Ex parte Buckley*, 14 L. J., Ex., 341. See further as to these cases, *post*, *Actions on Bills of Exchange—Proof of Acceptance*.

If an executor make a note, he is bound by it personally, unless he expressly state that it is to be paid out of the assets; *Childs v. Mouins*, 2 Br. & B., 460. So if an executor indorse a bill or note, he renders himself personally liable as indorser; *per Buller, J., King v. Thom*, 1 T. R., 487. And where A and B signed a formal promissory note, whereby they promised, as "churchwardens and overseers," to pay to C or order a certain sum of money, with interest, and which sum was in fact a loan made by C for the use of the parish: it was holden that A and B were personally liable upon the note. *Rew v. Pettit*, 1 A. & E., 196; and see *Archbold's Nisi Prius*, vol. ii., p. 112.

Where note made by more than one person.—Where more than one person signs a promissory note, all may of course be sued in one action, whether the promise is "joint" or "joint and several," or the plaintiff may sue one or more of the parties. See *ante*, p. 45.

The signature of all the parties sued must be proved.

A note beginning "I promise to pay," &c., and signed by two parties, is a joint and several note. *Clerk v. Blackstock*, Holt, 474; *March v. Ward*, Peake, 130.

If a person sign a note on a representation that others are to join, and one of the others afterwards refuse to sign it, no action can be maintained upon it against the party who thus signed it, unless it can be proved or fairly presumed that, knowing the facts, and being aware of his rights, he consented to waive the objection. *Leaf v. Gibbs*, 4 C. & P., 486.

Where the note is payable at a particular place.—If in the body of the note it is made payable at a particular place, a presentment of the note at that place must be proved; see *Spindler v. Grellett*, 17 L. J., Ex., 6. Also if a note be drawn payable at sight, a presentment must be proved.

Where, however, the note is made payable at a banker's, or other place, by a memorandum below the signature, this is not deemed any part of the note, and it is therefore not

necessary to prove any presentment there; *Williams v. Waring*, 10 B. & C., 2. But a presentment at such place will nevertheless be a good presentment to the maker.

It may be necessary to mention, with reference to a presentment for payment, that the three days' grace are allowed upon promissory notes, as well as upon bills of exchange. *Brown v. Harraden*, 4 T. R., 148; *Archbold's Nisi Prius*, vol. ii., p. 110.

How proof of defendant's signature dispensed with.—If the defendant has paid money into Court, that dispenses with the regular proof of the party's handwriting. *Gutteridge v. Smith*, 2 H. Bl., 374; *Middleton v. Brewer*, Peak, N. P. C., 15.

Where note lost or destroyed.—In actions upon promissory notes and bills of exchange, it is generally necessary for the plaintiff to produce the note or bill; but where it appears that the instrument has been destroyed, as where the defendant tore his own note of hand, a copy is admissible; *Anon.*, 1 *Ld. Raym.*, 731. In the latter case notice should be given to the defendant to produce the instrument. *See ante*, p. 25.

As to actions by executors and assignees, *see ante*, p. 131, 140.

The assignees of a bankrupt cannot in their names alone maintain an action on a promissory note or other *chase in action*, made to the wife of the bankrupt before her marriage. It seems doubtful whether an action to enforce such a security, ought to be brought in the names of the assignees and the wife; or whether, if the action were brought by the husband and wife, it might not be shewn in answer to the defence of the husband's bankruptcy, that the action was brought for the benefit of the assignees. *Sherrington v. Yates*, 13 L. J., Ex., 249.

EVIDENCE FOR THE DEFENDANT.

Denial of handwriting.—The defendant may give evidence to show that the signature is not in his handwriting, and his handwriting may be disproved by the same description of evidence by which it may be proved, namely, by the testimony of persons who have seen him write, or of those who have corresponded with him, although they have not seen him write. *Gould v. Jones*, 1 W. Bl., 384; *see ante*, p. 23.

Want of stamp.—The defendant may avail himself of any defect in the stamp upon the note, for if the stamp be wrong, the note cannot be given in evidence. And care

should be taken to make the objection before the note has been read in evidence. *See Foss v. Wagner*, 7 A. & E., 116.

Alteration of note.—The defendant may shew that the note, since he signed it, has been altered in a material part without his consent, or altered with his consent, or even by himself, after it passed into the hands of a person entitled to sue upon it, or without being re-stamped. *See post, Actions on Bills of Exchange.*

Want of consideration.—If the defendant made the note at the instance of the plaintiff, and without such a consideration as a pre-existing claim by or liability to the plaintiff, upon which the defendant might have been sued, and in respect of which the note was given, he is not liable on the note, or for such part of the amount as the want of consideration extends to. It is for the defendant to establish the want of such consideration, for in the absence of any such proof it is presumed that the note was made on a good consideration, and for value.

No note, bill, or cheque, given as a gift, can be enforced by the payee, but a moral obligation is a sufficient consideration. A debt due from a third person to the payee is a good consideration, and so is a debt due from the defendant jointly with another.

It is no answer to an action on a promissory note, that it was given in respect of an attorney's bill not previously delivered pursuant to the statute, 6 & 7 Vict., c. 73; *Jeffreys v. Evans*, 14 L. J., Ex., 363. But it is an answer that the defendant gave the note upon the application of the plaintiff for a debt of a deceased person, due to the plaintiff, and at the time there was no executor, administrator, or other person liable to pay it. *Nelson v. Serle*, 4 M. & W., 795.

So where the defendant pleaded that A B, having drawn a bill upon C D for his own accommodation, he, the defendant, indorsed it also for A B's accommodation, and A B then indorsed it to the plaintiff, after which it was altered in respect to the date without his knowledge or consent; that after the bill became due and was unpaid, the plaintiff applied to him for payment, and he not knowing of the alteration, and thinking that he was still liable, gave the plaintiff the promissory note in question; this was holden to be a good defence to the action; *Bell v. Gardiner*, 1 Dowd. N. C., 683. But an allegation that the note was given by the defendant to the plaintiff for the purchase of certain land, but the contract was not in writing, signed by the defendant or any person for him, was holden to be a bad plea, as it did not appear that the plaintiff had refused

to execute a conveyance of the land to the defendant, or that the defendant had not possession, and consequently did not shew a total failure of consideration; *Jones v. Jones*, 9 *Law J., Excr.*, 178. Where the defendant pleaded that the note was delivered to the plaintiff, and the plaintiff received it, for the purpose of paying certain debts of the defendant to his creditors, and that the plaintiff then promised him to pay the said debts, and that no consideration was received by the defendant or given by the plaintiff for the said note; to which the plaintiff replied that he received the note at the request of the creditors, for the purpose of paying them as soon as the defendant should pay the note; it was held that there was a sufficient consideration to entitle the plaintiff to judgment; *Cole v. Cresswell*, 11 *A. & E.*, 661; *Archbold's Nisi Prius*, vol. ii., p. 120. To an action against the maker of a note payable at three months, it was held to be no answer that it was made on account of a judgment debt recovered by the plaintiff against the defendant; for the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, and therefore there was consideration; *Baker v. Walker*, 14 *L. J., Ex.*, 371; and see *Gillett v. Whitmarsh*, 15 *L. J., Q. B.*, 291, as to defence that a note was given in satisfaction for a debt of a third person, but the plaintiff in violation proved against the estate of that person for the debt.

Accommodation note.—Proof that the note was made by the defendant for the accommodation of the plaintiff, is a good defence to the action, and is in fact only one mode of proving that the note was made without consideration.

Fraud.—The consideration must not be in fraud either of the defendant or third persons. Thus, if a man sells goods warranting them, and takes a note or bill in payment, and the warranty turns out false, and it be proved that he knew it at the time of sale, he cannot recover on the instrument. *Lewis v. Cosgrave*, 2 *Taunt.*, 2; and see *ante*, p. 38.

To an action on a note made by the defendant jointly with and as surety for another, to secure a sum advanced to the principal by a loan society, which was to be repaid by weekly instalments, it is no answer that the society fraudulently and without the defendant's consent charged a greater discount than was allowed by the rules of the society; it not appearing that the defendant became surety on the faith of the rules of the society being observed. *Brown v. Wilkinson*, 13 *L. J., Ex.*, 302.

If the defendant was so intoxicated as to be unable to know the effect and consequences of his signature it is a

good answer to the action. See *Gore v. Gibson*, 14 L. J., *Ex.*, 151.

Illegality.]—See *ante*, p. 39. The payee of notes given for money lost at play or by betting, cannot recover the amount.

Infancy.]—See *ante*, p. 30; and *Harrison v. Cotgreave*, 16 L. J., C. P., 198; *Harris v. Wall*, *Id.*, *Ex.*, 270.

Whether a promissory note, given by an infant for necessities, be valid, either at the suit of the original payee, or his indorsee, has never been expressly decided, but it seems it is not. *Byles on Bills*.

If an infant be a party, jointly with an adult, to a negotiable instrument, the owner may sue the adult alone, without taking notice of the infant. *Ibid.*

Coverture.]—See *ante*, p. 34.

Without authority from her husband, a married woman cannot at law charge either him or herself, by making, drawing, accepting, or indorsing negotiable instruments, not even if she live apart from him, and have a separate maintenance or be divorced.

If a single woman, being a party liable on a note or bill, marries, her husband becomes responsible, and they must be sued jointly. If (the debt being still unsatisfied) he dies, she is liable, and not his executors; if she dies, her representatives are liable, if there be assets, but not her husband, except in his representative capacity.

On the other hand, if a note be made to a married woman, it vests in the husband; and he can sue for it alone or jointly with his wife; he alone can indorse it. But if the husband die without recovering the amount, the note belongs at law to the wife, and not to the husband's executors, and she must bring the action.

Where a note or bill is given to a single woman, and she marries, the property vests in her husband, and he and his wife must join in the action upon it. If not recovered upon during their joint lives, it reverts to the woman, if she survive, or goes to the husband as her administrator, if he survive. See *Byles on Bills*.

Action brought prematurely.]—A written agreement by the payee of a note, not to sue upon it until a certain time, or until the happening of a certain event, if made for sufficient consideration, may be a good defence to an action upon the note by the payee against the maker. But in an action on a note drawn at a certain time after date, which had not been deposited as a collateral security, and the consideration of which was not disputed, it was held that no parol evidence could be admitted to prove an agreement that the note was not to be paid if a verdict were obtained in an

action then pending between other parties; for that would be to contradict a written contract by parol evidence; *Foster v. Jolly*, 1 Cr. M. & R., 703; *Archbold's Nisi Prius*, vol. ii., p. 121. Where by an agreement between the payee and maker of a promissory note and A B, it was arranged, after the note became due, that A B should pay to the payee, in trust for E B, 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum so long as the sum of 200*l.* should remain unpaid, and that the rights and causes of action of the payee upon the note should be suspended so long as the said A B should continue to pay the said sum of 25*l.*; it was held that the legal effect of this agreement was not to suspend the right of action of the payee upon the note, but only to subject him to an action, if he sued contrary to the terms of the agreement. *Ford v. Beech*, in error, 17 L. J., Q. B., 114.

Partnership.—Where a note, made by one member of a firm in his individual capacity, comes into the possession of the firm, they cannot sue him upon it, and proof that he is one of the members of the partnership will be a good bar to the action. So, if the note were made in the partnership name, and came to the hands of one of the partners in his individual right, he could not sue the partnership upon it. *Archbold's Nisi Prius*, vol. ii., p. 122; and see ante, p. 38.

Accord and satisfaction—delivery of another note or bill.—As to this defence in other actions on contracts, see ante, p. 54. Where to an action on a promissory note for 420*l.*, the defendant pleaded, that after it became due he gave the plaintiff, and the plaintiff received from him, two bills of exchange for 210*l.* each, to take up the note, and in lieu thereof; it was holden, that it was a question for the jury to say whether the bills were given in lieu and satisfaction of the note, or only to gain time for payment; if the former, it was a good defence, although it appeared that one of the bills was overdue and unpaid at the commencement of the action; if the latter, it was no defence, unless the defendant proved that at the time the action was commenced both the bills were outstanding. *Goldshede v. Cottrell*, 2 M. & W., 20; *Archbold's Nisi Prius*, vol. ii., p. 121.

Payment.—Payment is of course a good defence to the action, as in other cases of contract, see ante, p. 50; and *Beaumont v. Greathead*, 15 L. J., C. P., 130; but the payment should be made on the day the note becomes due. If however the plaintiff receives the amount afterwards, the defendant may shew such payment and acceptance.

Payment into Court.—The defendant may pay money into Court, and shew that he has paid part of the amount before, or otherwise satisfied the plaintiff in respect of it, or that the defendant has had no consideration for the note beyond the amount paid into Court.

Payment into Court admits the note, and dispenses with the necessity of the plaintiff's giving any evidence of the defendant's handwriting.

Tender.—The defendant may, in some cases, shew that he tendered the plaintiff the amount due, before the commencement of the action. Where the action is upon a note payable on demand, the tender must be made when payment is demanded, and a tender made subsequently to the first demand is no answer to the action; *Cotton v. Godwin*, 7 M. & W., 147. When the note is made payable on a particular day, the tender must be on that day, and a subsequent tender is not sufficient.

The tender may be of part of the amount specified in the note, if there is no more due, but it is doubtful whether the defendant can plead a set-off to part and a tender of the residue. *Cotton v. Godwin*, *supra*.

When in an action by the payee against the maker of a note, not negotiable, not being payable to order or bearer, the defendant pleaded that he was ready and offered to pay the note, if the plaintiff would give it up to him, but the plaintiff admitted that he had not the note, and never subsequently produced it or offered to deliver it up on payment thereof: this was holden to be a bad plea. *Wain v. Bailey*, 10 A. & E., 616.

Statute of Limitations.—That the debt is barred by the statute of limitations is a good defence in this as in other actions. *See ante*, p. 77.

Upon a note payable with interest upon demand, the statute begins to run from the date of the note. *Norton v. Ellam*, 2 M. & W., 461.

Where W. D., the maker of notes signed a memorandum, being an account settled between him and T. L., the holder of the notes, of monies advanced upon the notes, and wrote at the foot, "approved, due to T. L.—W. D.," with the date, and it appearing by extrinsic evidence that at the time the settlement was made, that the notes should be set off against, and satisfied by, a debt due from T. L. to the maker, it was held, that was not a sufficient acknowledgment to defeat the statute, as coupled with the evidence, no promise to pay the debt could be inferred from it; *Cripps v. Davis*, 13 L. J., Ex., 217. The joint and several maker of a promissory note, being in fact a surety for the other

maker, who was dead, and of whom Mrs. J. was executrix, wrote the following letter to the attorney for the payee, in answer to his application for payment:—"I am in receipt of your letter of the 6th, handed me this morning. I have forwarded it to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what she may be short I will assist to make up. I send you her address." It was held that, on failure of payment by Mrs. J., that this became an absolute promise to pay by the defendant, sufficient to take the case out of the Statute of Limitations; *Humphreys v. Jones*, 14 L. J., *Ex.*, 254. Where the maker of a promissory note for 117*l.* 4*s.*, after the death of the payee, gave his executor a promissory note for the interest, stating it to be "due on a promissory note from the undersigned to the late W. N. (the payee,) for 117*l.* 4*s.*, dated the 6th of July, 1838, up to the 6th of July, 1844," it was held, that this took the original note out of the statute, and also, it appears, that it was evidence of an account stated with the executor for the amount. *Penny v. Slade*, 15 L. J., Q. B., 10. The mere fact of part payment is some evidence, but not of itself conclusive to take the case out of the statute, and therefore, where the plaintiff applied to the defendant for 15*l.* 6*s.* as interest due to her upon a promissory note made by the defendant, and he gave the plaintiff a sovereign, stating that he had paid her 4*l.* in April; that he owed her the money, but would not pay it, seems to be insufficient, as containing no promise to pay. *Wainman v. Kynman*, 16 L. J., *Ex.*, 232; *Burn v. Boulton*, 15 *Id.*, C. P., 97.

The appropriation of the payment of interest to the debt, which it is sought to take out of the statute, may be proved by an admission, *see ante*, p. 88. In an action brought to recover the amount of five notes, one for 100*l.*, two for 50*l.*, and two for 20*l.* each; the evidence was, that within six years the maker, (the defendant,) on an application to him, said, his wife would have called on the holder and paid money on account of the interest on 200*l.* but for their child's illness, about a fortnight after which, the wife called, and paid fifteen shillings, without saying on what account; on another occasion the defendant sent word to the testator that his wife was in Wales, or would have called with the interest; and that the wife on other occasions made payments to the testator, who said at the time, he should be glad if the interest were more regularly paid. This evidence was held to warrant the jury in finding a verdict for the plaintiff. *Waters v. Tomkins*, 2 C. M. & R., 726.

The payment of interest, or of part of the principal, by one out of several makers of a joint and several promissory notes, takes it out of the Statute of Limitations as against the others, and may be given in evidence in a separate action against any of the others, *Whitcomb v. Whiting, Dougl.*, 652; *Wyatt v. Hodgson*, 8 *Bing.*, 313; and the fact of one of the defendants being only a surety is immaterial. *Perham v. Raynal*, 2 *Bing.*, 306.

A joint and several note is not taken out of the statute as against the executor of one of the makers, by a payment made by the other after the death of the deceased maker, for the joint contract is determined by the death of one of the joint contractors, *Atkins v. Tredgold*, 2 *B. & C.*, 23; nor will a payment by the executor of the deceased, under such circumstances, take the case out of the statute as against his survivor, *Slater v. Lawson*, 1 *B. & Adol.*, 396; but if one of two joint and several makers make a part payment before the death of the other, that part payment will take the case out of the statute against the administrator of the other, after his death. See *Smith's Leading Cases*, 2nd edit., vol. i., p. 319.

The statute 9 Geo. IV., c. 14, enacts, "that no indorsement or memorandum of any payment made upon any bill of exchange, promissory note, or other writing, by, or on behalf of, the person to whom such payment is made, shall be deemed sufficient proof of payment to take the case out of the operation of the Statutes of Limitation."

Insolvency and Bankruptcy.]—The insolvency or bankruptcy of the defendant is a good bar, in the same cases and under the same circumstances as in other actions of contract. See *ante*, p. 96.

Where the defendant and a surety joined in a promissory note to the plaintiff, the plaintiff, upon the defendant afterwards taking the benefit of the Insolvent Act, applied to the surety for payment; and the defendant in order to prevent the surety being sued, joined him in a new note; in an action against the defendant on this second note, it was held, that notwithstanding the new consideration for forbearance to the surety, this note was a new contract for the old debt, and that the defendant was not liable. *Evans v. Williams*, 1 *Cr. & M.*, 30; *Archbold's Nisi Prius*, vol. ii., p. 122.

Where the defendant, the maker of two promissory notes, was discharged under the 1st Vict., c. 110, and inserted the plaintiff, the payee, in his schedule as a creditor, in respect of two sums of money, without mentioning the promissory note, it was held, that the defendant was not discharged

from his liability to the plaintiff on the notes. *Leonard v. Baker*, 15 L. J., *Ex.*, 177.

INDORSEE v. MAKER.—EVIDENCE FOR THE PLAINTIFF.

In this action the plaintiff will have to prove the making of the note by the defendant, and also the indorsement. The indorsement, like the making, is shewn by proof of the handwriting; as to which, *see ante*, pp. 22, 209.

Formerly promissory notes were not negotiable instruments, and were holden not to be within the custom of merchants in that respect, as bills of exchange were; so that the indorsee could not maintain an action upon a note, either against the maker or the indorser, and even the payee could not maintain an action upon it against the drawer. But by stat. 3 & 4 Anne, c. 9, s. 1, promissory notes are put upon the same footing in these respects as bills of exchange.

To be transferable or negotiable thus, they must be payable to some person, "or order," or "bearer;" *Grant v. Vaughan*, 2 Burr., 31. Still, however, a note payable to A B, without saying "or order," or "bearer," is within the statute, and may be sued upon by the payee; *Smith v. Kendal*, 6 T. R., 123; *Rex v. Box*, 6 Taunt., 325; and a note payable to the order of the maker is, within the statute, and may be sued upon by the indorsee; *Wood v. Mytton*, 16 L. J., Q. B., 447; *overruling Flight v. Maclean*, *Id.*, *Ex.*, 23. And a note made by several persons payable to "one and each of our order," and indorsed by one of these persons, is a good promissory note within the statute. *Absolon v. Marks*, 17 L. J., Q. B., 7.

Where a promissory note, payable by instalments, contains a condition that the whole amount should become payable on default being made in payment of any part of the first instalment, the indorsee on such default may sue for the whole amount, as he stands in this respect in the same position as the payee. *Caslon v. Kinealy*, 13 L. J., *Ex.*, 64.

If the promissory note is payable to the bearer, or to A B or bearer, it does not require any indorsement, but may be transferred to another by mere delivery, and the production of the note by the plaintiff is evidence that the note has come to his hands by delivery from the party to whom the defendant delivered it.

If the note is made payable to the payee or order, the payee must indorse it before it can become negotiable, and such indorsement must be proved by proof of the hand-

writing, as above stated. And an indorsement, where necessary, must be express, and cannot be implied from any promise to indorse; *Archbold's Nisi Prius*, vol. ii., p. 44. If the note be drawn payable to A B, without the words "or order," or "or bearer," it is not negotiable, and none but A B can maintain an action upon it. *Hill v. Lewis*, 1 *Salk.*, 132.

It is to be observed, that the necessary amount of stamp often depends on the manner in which a note is made payable.

EVIDENCE FOR THE DEFENDANT.

It is a good defence that the note was made for the accommodation of the plaintiff; or that it was made for the accommodation of A B, and by him indorsed to the plaintiff without consideration. But if the plaintiff gave value for the note, it is no answer to the action that it was made for the accommodation of some preceding party, even although the plaintiff knew that fact. *Pearce v. Champneys*, 4 *Dowl.*, 276.

The indorsement of the note after it was due, subjects it, in the hands of the indorsee or any person claiming under him, to all the objections and equities to which it was liable in the hands of the party who held it at the time it became due. But the indorsee does not take it subject to any collateral claim then existing between the indorser and maker; and therefore, in an action by the indorsee against the maker of such an over-due note, a distinct debt due to the drawer from the indorser cannot be set off; see *Whitehead v. Walker*, 10 *M. & W.*, 696. And a promissory note payable on demand cannot be treated thus as a note overdue, so as to affect an indorsee with any equities against the indorser, merely because it has been indorsed to him a number of years after its date, although no interest has been paid on it for several years before such endorsement; *Brooks v. Mitchell*, 9 *M. & W.*, 15. And the reason why a party who takes an overdue bill or note takes it with all its equities, namely, because, on the face of it, it carries suspicion, does not apply to the case of a bill or note payable on demand. See *per Parks, B.*, *Cripps v. Davis*, 13 *L. J., Ex.*, 220.

That the note has been stolen or lost, and has come into the hands of the plaintiff without consideration, or that when he took it he knew it to have been stolen or lost, or that he took it without proper caution, will be a good defence to the action. *Archbold's Nisi Prius*, vol. ii., p. 129. See *post*.

Where a note is transferred with or without indorsement, after it has become due, or without consideration, anything said respecting it by the party in whose hands it was when it became due, or by the party who transferred it to the plaintiff without consideration, may be given in evidence in defence of an action at the suit of a subsequent indorsee. The rule in this respect is the same in the case of promissory notes as of bills of exchange. *Archbold's Nisi Prius*, vol. ii., p. 129.

Illegality, duress, and fraud and covin, are good defences. If the plaintiff was not a party to the fraud, &c., it must be shewn that he took the note with full knowledge of the circumstances (*see Musgrove v. Drake*, 13 L. J., Q. B., 16), or, that he gave no consideration for it, or, that it was indorsed to him after it was due. Evidence of either of these facts, with proof of the fraud, &c., on the part of the payee or indorsee, will disentitle the plaintiff to sue the defendant.

The defendant may shew payment of the amount of the note to the plaintiff by the indorser or payee after it became due. *See Shearm v. Burnard*, 10 A. & E., 593.

Statute of Limitations.—Where a promise in writing is given by the maker of a promissory note to the payee, it seems doubtful whether that promise, creating a new debt to the holder, attaches itself upon the note so as to be transferred to the indorsee, and made available by him to defeat the Statute of Limitations. *See Cripps v. Davis*, 13 L. J., Ex., 217.

Bankruptcy.]—The bankruptcy or insolvency of the defendant or plaintiff may be shewn as in ordinary cases, *see ante*, p. 96; so the defendant may shew the bankruptcy of the indorser before indorsement.

INDORSEE v. INDORSER.

In an action by an indorsee against the indorser of a promissory note, the plaintiff must prove the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour. *Roscoe*, 6th ed., p. 233.

The indorsement is proved by general evidence of the defendant's handwriting, or by any person present at the time, *see ante*, p. 211; as to presentment and notice, *see post*, *Actions on Bills of Exchange*.

This action may be brought against any indorser on the note previous to the plaintiff, whether he be the party who immediately indorsed it to the plaintiff or not. But if A indorse a note to B, and afterwards B indorse it to A,

A cannot maintain an action upon it against B; *Bishop v. Hayward*, 4 T. R., 470. It would be useless, for B might bring another action on the note against A. *Archbold's Nisi Prius*, vol. ii., p. 130.

Where the action is brought against some party who was not the immediate indorser to the plaintiff, the plaintiff must prove all the intermediate indorsements in order to shew his title to the note.

Defence.]—In respect to the matters necessary for the plaintiff to establish a *prima facie* case, the defendant can only deny his own indorsement, and that of the indorsee's subsequent to him upon the note. He cannot deny a previous indorsement, as his own indorsement is an admission of all the indorsements previous to it; nor can he deny the making, for the same reason; *Archbold's Nisi Prius*, vol. ii., p. 130. The defendant may disprove his handwriting, or that of a subsequent indorser, by such evidence as the maker of a note may produce to disprove his; *see ante*, p. 213. It has been already stated that the indorsee of an overdue promissory note takes it subject to all the equities to which it would have been liable in the hands of the person who was the holder of it at the time it became due.

ACTIONS ON BILLS OF EXCHANGE*.

§ 1. *Payee v. Acceptor.*

§ 2. *Indorsee v. Acceptor.*

§ 3. *Drawer [not being Payee] v. Acceptor.*

§ 4. *Payee v. Drawer.*

§ 5. *Indorsee v. Drawer.*

§ 6. *Indorsee v. Indorser.*

The necessary evidence in actions on bills of exchange will be confined to inland bills. Actions on foreign bills

* A learned Judge of the Court of Common Pleas suggested a doubt whether bills of exchange or promissory notes are within the operation of the County Courts' Act, as the cause of action in respect of them does not arise in any particular place; *see Meeten v. Vickers, County Courts' Chronicle*, p. 268. As, however, the summons is in general issued in the district in which the defendant resides, and the Act merely allows it to be issued in some cases, by leave of the Court, in the district in which the cause of action arose, the difficulty seems to be confined to the issuing of the summons by leave of the Court, and it is now settled that actions on bills and notes are within the cognizance of the County Courts, although the superior courts may have a concurrent jurisdiction.

are not likely to occur in the County Courts. By an inland bill is meant a bill of exchange drawn in England, Wales, or Berwick-upon-Tweed, upon London, or some other place within those parts of the realm.

PAYEE v. ACCEPTOR.—EVIDENCE FOR THE PLAINTIFF.

The plaintiff must produce the bill, and prove the acceptance by the defendant.

The acceptance is proved by evidence of the acceptor's handwriting, or, if there is an attesting witness, by calling him; *Roscoe*, 6th edit., p. 207. As to the necessary evidence on these points, *see ante*, p. 209.

Whether the bill is payable to the drawer, or the payee is a third person, it is equally unnecessary to prove the handwriting of the drawer, for the defendant has admitted that by his acceptance.

By stat. 1 & 2 Geo. IV., c. 78, s. 2, "no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts."

It is not, however, necessary that the acceptor sign his name to the bill. If he write upon it the word "accepted," or write upon it an order upon another person to pay it, or the like, it is an acceptance; but the acceptance must be in the name of the person upon whom the bill is drawn. *Davis v. Clarke*, 13 L. J., Q. B., 305.

If the bill be drawn after date, and be not presented for acceptance until after it is due, still, of course, it must be accepted, in order to render the acceptor liable; and an acceptance in that case is deemed a general acceptance to pay upon demand; *Bayley on Bills*, p. 181. On the other hand, there is no objection to the acceptance being written before the drawer has signed the bill; *Mellory v. Delves*, 7 Bing., 428; or even before the bill is drawn, if it be afterwards drawn in pursuance of the acceptor's authority. *Leslie v. Hastings*, 1 M. & Rob., 119; *Archbold's Nisi Prius*, vol. ii., p. 6.

Where acceptance is by agent.—If the bill be drawn upon the drawee, as servant, clerk, or agent of another, and he accept it generally, he will be personally liable, and may be sued upon it; *Bayley*, 181. On the other hand, if a servant, clerk, or agent, accept the bill on behalf of the drawee, and express that clearly upon the face of the acceptance, if he had authority to do so, he will not be liable upon the acceptance, but the drawee will be deemed the acceptor, and is liable, although wrongly described by his agent in

the acceptance. And where a wife has authority to accept for her husband, and does so in her name, the husband is liable. *Lindus v. Bradwell*, 17 L. J., C. P., 121.

But if the agent, &c., had no such authority, then the drawee is not liable, but the agent is. *Polhill v. Walker*, 3 B. & Ad., 114.

If the bill be accepted by an agent by procuration, in addition to proof of handwriting, his authority to accept must be shewn, *Atwood v. Munnings*, 7 B. & C., 278, either expressly by the agent himself, who may be called as a witness, or otherwise, or impliedly, by proving that the defendant knew of it or consented to it; *Bayley on Bills*; or paid other bills accepted in the same way. *Lewellyn v. Winckworth*, 14 L. J., Ex., 329; see also *Fearn v. Filica*, 13 L. J., C. P., 15; and as to agents in general, *ante*, p. 112.

Where acceptance is by partner.—If the bill be drawn upon a firm of two or more persons, an acceptance by one will bind the others, provided he accept it in the usual name of the firm, and the trade of the partnership be one which may be presumed to require the acceptance of bills. But if they be partners in a profession or business not necessarily requiring the acceptance of bills, as, for instance, they be attorneys, *Lovy v. Pyme*, 1 Car. & M., 463, or jointly occupy a farm, *Greenslade v. Dover*, 7 B. & C., 635, and one partner accepts in the name of the firm, or in his own name, it will not bind the other, unless it be shewn that the latter gave his authority, either generally or specially, with reference to that particular bill, to accept for the partnership. And if a bill be drawn upon several persons, who are not partners, an acceptance of one will bind him alone, and not the others; *Bailey*, 52; *Bul.*, N. P., 279. But even in the case of partners in a trade requiring acceptances, if one partner accept a bill in the name of the firm, in fraud of the other partners, it will not bind them in the hands of a person privy to the fraud, or who had notice of it; *Bayley*, 180. And where A and B carried on trade as partners for some time, and then took C into partnership, after which A and B accepted a bill in the name of the new firm, for a debt accruing partly from the old firm, partly from the new; in an action by the drawer against A B and C, it was held that the plaintiff was entitled to recover only the amount due from the new firm. *Wilson v. Bailey*, 9 Dowl., 18.

If the bill be accepted in the name of the firm, besides the handwriting, the plaintiff must prove the names of the persons constituting the firm, so as to shew that they correspond with the names of the defendants sued and described

in the summons. And if the trade of the partnership be not of such a nature as necessarily to require the acceptance of bills, the authority of the partner who accepted it must be proved in the same manner as in the case of an acceptance by an agent by procuration. *Levy v. Pyne*, 1 Car. & M., 453; *Greenslade v. Dower*, 7 B. & C., 653; *Archbold's Nisi Prius*, vol. ii., pp. 7, 10.-

Qualified acceptance.]—In general, the plaintiff is not obliged to prove any presentment of the bill, but if it is made payable at a particular place, and not elsewhere, then the plaintiff must, in addition to the proof of acceptance, prove the presentment and non-payment there.

By stat. 1 & 2 Geo. IV., c. 78, s. 1, it is enacted, that "if any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."

Conditional acceptance.]—If the acceptance be conditional, the plaintiff must prove that the condition has happened upon which the bill was payable, according to the tenor of the acceptance; *Banbury v. Lissett*, 2 Str., 1211. The drawer may accept the bill in a manner varying from the tenor of the bill, and 'in that case also he will be bound according to the tenor of his acceptance, as where a bill was accepted to be paid half in money, half in bills; *Petit v. Benson*, Comb., 452; or where a bill named no time of payment, and was accepted on the 18th of April, payable on 2nd of September. *Walker v. Atwood*, 11 Mod., 190.

Production of bill.]—The bill itself must in general be produced, and the payee of a negotiable bill, having lost it, cannot maintain an action upon it against the acceptor, without producing it; *Ramus v. Crowe*, 16 L. J., Ex. 280; although the acceptor have promised to pay it. *Hansard v. Robinson*, 7 B. & C., 90.

If at the time of the trial the bill be in the hands of the acceptor (of course an unusual case), the plaintiff may give him notice to produce it; and then, if he do not produce it, the plaintiff may give secondary evidence of its contents. *Smith v. M'Clure*, 5 East, 476.

EVIDENCE FOR THE DEFENDANT.

Denial of handwriting.—The defendant may give evidence to shew that the acceptance is a forgery; and this must in general be proved with as much strictness as upon an indictment for the offence. *Griffiths v. Payne*, 11 A. & E., 131.

The plaintiff will be allowed to give in evidence bills of which the acceptance is confessedly in the defendant's handwriting, that the judge or jury may be enabled to compare the acceptance with that of the bill in question. *Allesbrook v. Roach, Peake, Ad. Ca.*, 27; and see *ante*, p. 25, and p. 211.

Want of stamp.—As in the case of promissory notes and other instruments, the defendant may object to the absence or insufficiency of a stamp on the bill. The objection should be taken before the bill has been read in evidence.

Alteration of bill.—The defendant may avail himself of any material alteration in the bill made without his assent, or which may prevent it from being given in evidence for want of a new stamp. *Archbold's Nisi Prius*, vol. ii., p. 15.

An alteration made after the bill has been accepted, without the consent of the acceptor, in any material part of the bill, as in the sum, or in the place where it is to be payable; *Tidmarsh v. Grover*, 1 M. & S., 735; or in the date, if the bill be drawn after date, *Master v. Miller*, 4 T. R., 320; 2 H. Bl., 141; *Cock v. Coxwell*, 2 C. M. & R., 291; or by substituting "date" for "sight," *Long v. Moore*, 3 Esp., 155 (n), or the like will vitiate the bill as against the acceptor, and be a good defence to any action upon it against him. But if the alteration be not in a material part, as where the bill was wrongly addressed "S. C. & Co.," instead of "S & C.," and it was altered accordingly after acceptance, it is otherwise; *Farquhar v. Southey, Moody & Mal.*, 14; and the same, if the alteration be made with the assent of the acceptor. *Cariss v. Tattersall*, 2 M. & Gr., 890; and see *Archbold's Nisi Prius*, vol. ii., p. 16, and cases cited there.

And an alteration, even though made by the acceptor himself, or with his consent, or the consent of all the parties to it, if made after the bill is negotiated, or is in the hands of a person entitled to sue upon it, if the alteration be in a material part, such as the date, or in the time for which it is drawn, or the rate of interest to be paid on it, or by inserting the words "or order," if they were not intended to

be in, or by adding after the words "value received," terms importing the particular nature of the debt or value given, will be a good defence to an action against any of the parties to the bill; it is deemed a new bill, and requires a fresh stamp, without which it cannot be given in evidence. But such an alteration made before the bill is complete, by being signed by all the parties, or by being accepted, or before it is negotiated, or in the hands of a person who can sue the acceptor upon it, and before it is due; or if made merely to correct a mistake and to make the bill such as was originally intended; or if the alteration be in a part not material, so as not to give it the effect of a new bill, as if it be altered in respect of the place where it is to be payable, or the like, —the bill in those cases will not require a new stamp, and the acceptor will be liable. And in all these cases of material alterations, where the alteration is apparent upon the face of the bill, the onus is upon the plaintiff to prove that it was made under circumstances which do not affect the validity of the bill; and in the case of his failing to give the requisite explanation, he must be nonsuited. *Knights v. Clements*, 8 Ad. & E., 215; *Archbold's Nisi Prius*, vol. ii., pp. 16, 17, and cases there cited.

Want of consideration.]—That the bill was accepted without consideration or for the accommodation of the drawer, is a good defence to an action by the drawer, as it is in an action by the payee against the maker of a promissory note. *Ante*, p. 214.

Where a man lent his acceptance to one of the partners of a firm, upon his undertaking to provide for the bill, and an action was afterwards brought upon it by the firm against the acceptor, the Court held that they could not recover; *Sparrow v. Chisman*, 9 B. & C., 241; and see *Johnson v. Peck*, 3 Stark., 66. So, where bills were accepted by A, for the accommodation of B, and the latter, being executor for C, and having a sum of money belonging to C's estates, which was kept in a box in his possession, substituted the bills for so much of the money, deducting the discount: it was holden that he and his co-executor could not sue the acceptor upon these bills. —*v. Adams*, 1 Young, 117.

So, if the bill was accepted for the accommodation of the drawer in part, he cannot recover for that part; as between these parties, the bill is to be considered as a bill for the residue only. *Darnell v. Williams*, 2 Stark., 166.

Failure of consideration.]—That the consideration has wholly failed, is a good defence;—as where the bill was given as a premium with an apprentice, and it turned out

that the indenture was void for not mentioning this premium, and from not being stamped accordingly; *see Jackson v. Warwick*, 7 T. R., 121; or where the apprenticeship had been dissolved for misconduct in the master; *Grant v. Welchman*, 16 East, 207; or where the contract upon which it was given has been rescinded; *see Mills v. Oddy*, 1 Gale, 92; or where it was given as a reward to the plaintiff if he should procure the defendant to be restored to an office, and he was not restored; *see Jefferies v. Austen, Str.*, 647. So where A having distrained for rent certain goods which B had sold to C, although A knowing at the time that no rent was due to him, and by misrepresenting the fact obtained C's acceptance for the amount, in consideration of his withdrawing the distress; *Grew v. Bevan*, 3 Stark., 104; or where A, having appointed B his executor, gave him his acceptance, in consideration of the trouble he should have in the executorship, and B afterwards died in the lifetime of A, and an action on the bill was brought by his executor; *see Jolly v. Hinde*, 2 C. & M., 516; in these and the like cases, the total failure of consideration has been holden a good defence to the action. *See Lewis v. Cosgrave*, 2 Taunt., 2. But where a bill was accepted for the balance of the purchase money of certain articles bought at a sale, and in about two months after the delivery of the goods to the vendee, the vendor forcibly took them out of his possession, it was holden that the vendee could not treat this as a rescinding of the contract, and set it up as a defence to an action upon the bill by the payee; he must seek his remedy by an action of trespass. *Stephens v. Wilkinson*, 3 B. & Ad., 320.

A partial failure of the consideration is no answer to an action by the drawer against the acceptor; as where the bill had been accepted for goods sold, it was holden to be no answer to say that the consideration had partially failed, on account of the badness of the quality, or improper package of the goods delivered; *Tye v. Gwynne*, 2 Camp., 346; *Morgan v. Richardson*, 1 Camp., 40 (n.); 7 East, 482 (n.); or that they had turned out to be worth much less than the amount of the bill, and that the defendant had already paid on account of the bill more than the value of the goods; *Obbard v. Betham, Moody & M.*, 483; unless he could make out that it arose from fraud upon the part of the plaintiff; *Fleming v. Simpson*, 1 Camp., 40 (n). So, where A agreed to execute a lease of certain premises to B, who was to pay a certain sum for it; and B, being let into possession of the premises, accepted a bill drawn upon him by A for the amount; it was holden to be no answer to an

action by A against B upon the bill, that A had refused to execute the lease; *Moggridge v. Jones*, 14 East, 486. So, where to an action by the drawer against the acceptor of a bill for 20*l.*, the defendant alleged that, before the drawing and acceptance of the bill, the plaintiff agreed to do certain carpenter's work for the defendant for 63*l.*, and that the defendant paid him 43*l.* in part, and afterwards accepted the bill in question on account of the residue; that the plaintiff did not perform some of the work, and performed in an unworkmanlike manner other work which was necessary to be done under the agreement; and that the 43*l.* paid was more than the whole of the work done was worth; this was held to be an insufficient answer to the action, as amounting merely to a partial, not to a total failure of consideration; *Trickey v. Lorne*, 6 M. & W., 278. So where in an action by the drawer against the acceptor of a bill of exchange drawn in November, "for value received to Michaelmas last," the defendant alleged that, before the acceptance, he held a messuage, &c., as tenant to the plaintiff at a certain rent, and that the bill was drawn and accepted in payment by anticipation (amongst other considerations) of 12*l.* 10*s.*, part of the said rent not then due; and that, before the drawing and accepting of the bill, the plaintiff assigned the messuage to A B, of which the defendant had no notice until after the bill was accepted and delivered to the plaintiff, when A B demanded and received of the defendant the said rent of 12*l.* 10*s.*, and that therefore the consideration for the acceptance, as far as respected the said sum of 12*l.* 10*s.*, wholly failed; it was held that these facts constituted no answer to the action on the bill generally, as they went only to part of the consideration, and fraud was not necessarily to be inferred from them. *Clark v. Lazarus*, 2 M. & G., 167. So the mere inadequacy of the consideration is no defence. *Solomon v. Turner*, 1 Stark., 51; *Archbold's Nisi Prius*, vol. ii., p. 28.

As to defences in general, see *ante* p. 29, to p. 107.

INDORSEE v. ACCEPTOR.

In this action, besides the facts required to be proved in an action by the payee, the plaintiff must prove the indorsements, for the acceptance only admits facts that were necessarily apparent on the face of the bill when accepted; therefore none of the indorsements are admitted by the acceptance; *Smith v. Chester*, 1 T. R., 654. The indorsements are proved by evidence of the handwriting.

Defence.—Want of consideration, illegality, &c., are in

general good defences in the same cases as in an action by the indorsee against the maker of a promissory note. *Ante*, p. 222.

DRAWER v. ACCEPTOR.

When a bill, not payable to the drawer's own order, has been dishonoured and taken up by the drawer, the latter may sue the acceptor, and in such action must prove—1. The acceptance, as to proof of which, *see ante*, p. 225. 2. The presentment to the defendant, and his refusal to pay; which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment. And, 3. The return of the bill to, and payment thereof by, the plaintiff; *Roscoe*, 6th edit., p. 211. To prove the latter fact, it is not sufficient to produce the bill with a receipt on the back of it from the then holder; for the receipt, *prima facie*, imports that the bill was paid by the acceptor. *Scholey v. Walsby*, *Peake*, 24.

In this action the plaintiff may be for money paid to the plaintiff's use. *See ante*, p. 195.

PAYEE v. DRAWER.

In an action by the payee against the drawer, the plaintiff must prove—1. The drawing of the bill; 2. Presentment to the drawee or acceptor, and his default; 3. Due notice to the defendant of the dishonour. *Roscoe*, 6th edit., p. 212.

The drawing.]—The drawing of the bill is proved by evidence of handwriting.

Presentment.]—It is sufficient, if the bill is accepted generally, that payment be demanded at the drawee's or acceptor's usual residence or place of business, from his wife or other agent, and a personal demand is unnecessary. In ordinary bills payable at a certain time, where three days' grace are allowed, the presentment must not be before the last day.

Notice of dishonour.]—No particular form of notice is required, it may be either written or verbal. It should show, however, directly or by necessary implication, first, that the bill has been presented; secondly, that it has not been paid; and thirdly, that the party to whom the notice is given is looked to for payment; *East v. Smith*, 16 *L. J.*, *Q. B.*, 292. Putting a letter into the post is the most common mode of giving notice, and it is not necessary to prove that the letter was received. *See Woodcock v. Houldsworth*, 16 *L. J.*, *Ex.*, 49.

When both the parties live in the same town, the notice

must be given in time to be received in the course of the day following the day of dishonour, but where they live at different places, it is sufficient to *send off* notice on the day next after the day of dishonour.

INDORSEE v. DRAWER.

The proofs in this action will be the same as in an action by the payee against the drawer, with the additional proof of the indorsements.

INDORSEE v. INDORSER.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters: 1. The indorsement of the defendant; 2. The indorsement between that of the defendant and the plaintiff; 3. The presentment to the drawee or acceptor, and the dishonour; 4. Due notice of the dishonour to the defendant. *Roscoe, 6th edit., p. 222. As to these proofs, see ante, p. 231, 232.*

ACTIONS ON CHEQUES.

A cheque on a banker is in legal effect an inland bill of exchange payable on demand. It is, consequently, subject in general to the rules which regulate the rights and liabilities of parties to bills of exchange. *Byles on Bills.*

The payee may, upon the non-payment by the banker, sue the drawer for the amount; and to entitle him to do so, he is not in general bound to present the cheque at the bank within any given time. It has been said that it may be presented at any time within six years. *See Robinson v. Hawkesford, 15 L. J., Q. B., 377.* In case, however, of the failure of the banker, and the non-payment of the cheque on that account, it is necessary, to entitle the holder to sue the drawer, that the cheque should be presented for payment immediately. If the payee lives in the same place as the banker he must present the cheque on the same or the following day. If he do not live in the same place, he must cause it to be presented on or before the third day.

Where the cheque is circulated from hand to hand, the liability of the drawer, in case of the failure of the bank, cannot it seems be enlarged by that circumstance; and therefore, in order to charge him, if the bank fails, the cheque, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it; but as against the party transferring the cheque to the holder, it is sufficient, whatever be the

date of the cheque, to present it, or forward it for presentment, on the day next after the transfer. *Byles on Bills*.

Cheques are exempt from stamp duty, if drawn on a banker, and within fifteen miles of the bank, and state the place where actually drawn. They must also be payable to bearer on demand, and not be post-dated. Otherwise they must be stamped as bills of exchange.

INTEREST.

Although in some cases interest may be claimed on ordinary debts (*see ante*, p. 14), actions for interest alone are seldom brought, except on some written instrument or security for money. And although the principal sum on which the interest is claimed exceeds 20*l.*, it seems clear that the County Courts have jurisdiction in actions for interest to that amount. Therefore the action is maintainable in these Courts for arrears of interest on mortgage deeds, bonds, or promissory notes, whatever may be the amount of the principal sum. *See County Courts Chron.*, p. 78.

The evidence in these cases will in general consist of the production and proof of the deed or instrument, in the same manner as if the action were brought to recover the principal, *i. e.*, by calling the attesting witness, or proving the handwriting. *See ante*, p. 209.

The rate of interest is generally specified in the instrument; but where no mention is made of it in a promissory note, the payee will in general be entitled to 5*l.* per cent. If expressly agreed for, any rate of interest may be recovered on bills or notes not having more than twelve months to run, and on all contracts for the loan of money above the sum of ten pounds. When, however, the principal sum is secured by land, the interest is usurious if it exceeds 5*l.* per cent.

ACTIONS ON GUARANTEES.

In an action on a guarantee for the debt of a third person the plaintiff must prove the contract, and the performance of his part of it, and, in general, the failure of the principal to pay.

The contract.—The plaintiff must prove a written agreement, for the Statute of Frauds, 29 Car. II., c. 3, s. 4, provides "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and

signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Where credit is given to one person only, although the goods are in point of fact delivered to a third, in that case the former is the only person liable, and is in the situation of any ordinary defendant who is sued for goods, &c., supplied to him; and, consequently, that is not a case within the above statute, which only applies where the engagement is collateral, *i. e.*, where there exists a debt on legal liability on the part of a third person, to whom the defendant by his guarantee procures credit to be given. If the person for whose use goods are furnished upon the defendant's guarantee, be liable at all, the defendant's engagement, though it were the chief inducement to the plaintiff to supply the goods, is collateral, and must be reduced to writing; and the plaintiff must in that case state the action to be on the guarantee, and it will not be sufficient to allege that the defendant is indebted for goods, work, &c., the subject of the guarantee.

It is a question of fact for the jury, if there be one, to whom the credit was given in the particular circumstances of the case.

Where the plaintiff was induced to send goods to a person with whom he was unacquainted, by the defendant's verbal promise that he "would see the plaintiff paid," and the plaintiff debited the party receiving the goods, it was held that the defendant's verbal undertaking was merely collateral, and therefore that it was void, not being in writing; *Matson v. Wharam*, 2 *T. R.*, 80. But where A introduced B to C, an upholsterer, and A, in B's presence, asked C if he had any objection to supply B with some furniture, and that if he would "he would be answerable," and C asked A how long credit he wanted, and A replied "he would see it paid at the end of six months." The entry in C's books was "Mr. B per Mr. A;" it was held that the jury were warranted in finding that the undertaking on the part of A was not a collateral undertaking; *Simpson v. Penton*, 2 *C. & M.*, 430; see *Sweeting v. Asplin*, 7 *M. & W.*, 165. Where the transaction is of a doubtful character, the subsequent conduct of the creditor will be evidence to shew that he viewed it as one of guarantee only. Where the promise is, "You may send the goods to A, and I will take care the money shall be paid at the time," if this be an original promise, the creditor cannot treat it as such, if he has sent a bill of parcels to A charging him as the debtor, or has written letters to the defendant terming the promise a guarantee for A; *Rains v. Storry*, 3 *C. & P.*, 181. Where

the original demand is destroyed or discharged by the new agreement, the statute does not in general apply; and if the third party be not liable by law for the demand, as in the case of goods, not being necessaries, furnished to an infant, the defendant's promise cannot be considered collateral, and consequently need not be in writing; nor does the statute apply if the defendant were himself, either alone or jointly with others, originally liable for the demand which forms the subject of his subsequent promise.

Where the contract is a guarantee, the consideration for the promise, as well as the engagement itself, must be in writing; and the omission cannot be supplied by verbal testimony. *See cases collected in Chitty on Contracts, and Smith's Leading Cases; see also, Price v. Richardson, 15 L. J., Ex., 346; Martin v. Wright, 14 Id., Q. B., 142; Tanner v. Moore, 15 Id., Q. B., 391; Chapman v. Sutton, Id., C. P., 166; Temple v. Pink, 16 Id., Ex., 237.*

The guarantee must be duly stamped, unless it relate to the sale of goods, and falls within the exception to the Stamp Act. *See Martin v. Wright, 14 L. J., Q. B., 142.*

Defence.]—The liability of the surety may be discharged in various ways. If there is a misrepresentation by the creditor as to the contract between himself and the principal, or a subsequent alteration of the terms between them, the surety is discharged. So the alteration of the guarantee in a material part while in the hands of the plaintiff; *Davidson v. Cooper, 13 L. J., Ex., 276.* Giving time to the principal discharges the surety, but not mere forbearance or refraining from taking proceedings. Taking a composition from or a release to the principal discharges the surety, unless there is an express reservation of rights to enforce securities. *See Kearsley v. Cole, 16 L. J., Ex., 115.*

As to defences in general, *see ante*, p. 29 to 107.

PART II.

ACTIONS FOR TORTS.

INJURIES TO THE PERSON.

AND FIRST, OF THOSE THAT ARE WILFUL OR INTENTIONAL.

§ 1. *Assault.*§ 2. *False Imprisonment.*

EVIDENCE FOR THE PLAINTIFF IN AN ACTION FOR AN ASSAULT.

In an action for assault the plaintiff must prove the assault by the defendant, and he may give evidence of facts tending to shew the amount of damage or injury he has sustained.

Proof of the assault.—In actions in the superior courts, a distinction exists between an assault and a battery; an *assault* being defined as an attempt to offer, with force and violence, to do a corporal hurt to another; and a *battery*, as an injury, however small, actually done to the person of another, in an angry, revengeful, rude, or insolent manner. As, however, one of the objects of the Act establishing County Courts was to simplify proceedings, it is advisable to adopt the popular meaning of *assault*, as including both descriptions of injury, which there is no difficulty in doing, as by law every battery includes an assault. Moreover an action very seldom arises out of a mere assault in the legal sense of the term.

To constitute an assault it is not necessary that the act of violence should be originally directed at the *person* of the plaintiff. It must, however, arise immediately from the act committed.

To upset a carriage or chair in which a person is sitting, is a trespass against the person; *Hopper v. Reeve*, 7 Taunt., 698, 700. Where the defendant threw a lighted squib into a market-house, where a large concourse of people were assembled; and the squib falling upon the standing of B, he, to prevent injury to himself and wares, threw it across

the market-house, where it fell upon the standing of C; and he, from the like motive, threw it among the crowd, where it burst, and injured the plaintiff; it was held that the defendant was liable as for an assault; *Scott v. Shepherd*, 3 Wils., 403, 2 W. Bl., 892. This case, however, is only of importance in actions in the County Courts in determining the proper form of plaint, for it was never doubted that the defendant in the above case was liable to some action for the injury done to the plaintiff, the question was simply as to the form. In cases where the injury is accidental, the term "assault," although often legally applicable, should not be used in the plaint. *See post, Actions for Injuries arising from negligence.*

The plaintiff must prove that the assault was committed by the defendant, or that he was present at the time, aiding and abetting; or that he procured or incited others to do it. The same rule prevails in actions for this species of tort as in criminal proceedings for misdemeanors, with respect to defendants: in misdemeanors all persons who order or incite others to commit the offence, or procure it to be committed, and all persons present, aiding and abetting in the commission of it, are principals, as fully as the person by whose hand it is actually committed. So in an action for assault, all persons who order or procure it to be done, or incite others to do it, may be made defendants in the action. *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 413.

[*Damages.*]—In general the facts spoken to, to establish the fact of the assault will furnish information upon which the damages may be estimated by the judge, or the jury, if there be one; but, nevertheless, independent evidence may be given of the circumstances which accompany and give a character to the trespass, in order to enhance the damages; *Bracegirdle v. Orford*, 2 M. & Sel., 79. The circumstances of time and place, when and where the insult was given, require different damages; thus it is a greater insult to be beaten upon the Royal Exchange than in a private room; *per Bathurst, J.*, *Tullidge v. Wade*, 3 Wils., 19; *Roscoe*, 6th edit., p. 474. A surgeon who speaks to the nature of injuries sustained by a plaintiff, may also prove the amount of his charge for attendance. So any other payments arising out of the injury are to be taken into consideration. And not merely payments, but any loss sustained by the plaintiff, as of wages, &c., arising from his inability to work through the injuries received, may be given in evidence.

[*Evidence confined to particulars.*]—In this action, as in every other, the evidence must be confined to the plaint, and as the plaintiff in this action will generally seek to

recover damages above 5*l.*, particulars of the demand must be given, and the evidence in like manner confined to them.

Where the particulars mention only one assault, the plaintiff cannot, after giving evidence of one assault, waive it, and give evidence of another; *vide Stants v. Picket*, 1 *Camp.*, 473. And where the action is brought against several for a joint assault committed at a particular time, he must confine himself to that period; and if all the defendants were not then concerned in the assault committed at that time, the plaintiff cannot have recourse to an assault committed at any other time when some only of the defendants were concerned who were not implicated in the first transaction; for some of the defendants might thereby be subjected to damages for an offence in which they had no concern. *Sedley v. Sutherland*, 3 *Esp.*, 202.

EVIDENCE FOR THE DEFENDANT.

The defendant may controvert the fact of the trespass, or that it was committed by him, or at his instigation. All these, however, are points which the plaintiff is bound to make out before he can succeed, and therefore we shall proceed at once to consider those defences which constitute a good answer or justification to any *prima facie* case of assault established by the plaintiff.

That the plaintiff made the first assault.—One of the most common defences to an action for assault is that the plaintiff made the first assault, and that the defendant's assault was in self-defence. In the language of pleaders this plea is called *son assault demesne*. The onus of proof in this case is upon the defendant: and to establish this defence, he will have to prove that the plaintiff assaulted him first, and that he then, in his own defence, and as part of the same transaction, assaulted or beat the plaintiff. If he proves that the plaintiff lifted up his stick and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him; *B. N. P.*, 18. But where it appeared that after an angry dispute between the parties, the defendant came up to the plaintiff as if to attack him, and the plaintiff then put himself into a fighting attitude, and that the defendant thereupon beat him: it was holden that the plaintiff thus putting himself into a fighting attitude was not an assault which would justify the defendant beating him; *Moriarty v. Brooks*, 6 *C. & P.*, 684: for it is not every assault that will justify every assault in retaliation; and it is matter of evidence whether the assaults were pro-

portionable; thus if A strike B, B cannot justify drawing his sword and cutting off A's hand. *Cook v. Beal*, 1 *Ld. Raym.*, 177.

Justification in defence of possession.—If the plaintiff enters forcibly into the defendant's house, the latter may resist force by force, without any previous request to depart. The defendant in this case must show that the plaintiff with a strong hand endeavoured forcibly to break and enter the defendant's house, whereupon the defendant resisted and opposed such entrance, and that, if any damage happened to the plaintiff, it was in the defence of the possession of the house; *Com. Dig. Pleader*, 3 *M.*, 16, 17. Where the plaintiff alleged an assault and dragging through a pond, it was held that the defence, that the plaintiff was unlawfully in the defendant's close, was no answer to that part of the assault which consisted in dragging the plaintiff through the pond. *Bush v. Packer*, 1 *Bing.*, *N. C.*, 72.

If the plaintiff entered the defendant's house without violence, although without the express consent of the defendant, the latter, to justify an assault in turning the plaintiff out, must shew his possession, the plaintiff's entry, the request to depart, and his refusal; but the defendant's refusal to depart would not justify a *wounding* with a truncheon. *Oakes v. Wood*, 2 *M. & W.*, 791; *see also*, 3 *M. & W.*, 150.

The plaintiff must prove in either case that he was possessed of the house, &c. Where it was proved that the defendant had the key of the house to let himself in to work, no person sleeping in it, this was holden sufficient evidence of his possession; *Hall v. Davis*, 2 *C. & P.*, 33. But where it appeared that the defendant had hired a steamboat for an excursion, the owner's captain navigating it, it was holden that the defendant had not a sufficient possession to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board; *Dean v. Hogg*, 10 *Bing.*, 345. The steward of races is possessed of a stand. *See Wood v. Ledbitter*, 14 *L. J.*, *Ex.*, 161.

That the plaintiff was in the house at the time of the alleged assault. It seems to be immaterial whether he was making a noise or disturbance, if he was required to depart; for no man, without authority by law, can lawfully remain in the house or close of another, after the occupier has required him to leave it. If, indeed, it were a public-house or inn, in which the public has a right to go and remain at proper hours, it would be different; for there it must be shown that the plaintiff was making a great noise and disturbance, or otherwise misbehaving himself, to justify the

publican or inkeeper in turning him out; see *Webster v. Watts*, 17 L. J., Q. B., 73. Where the plaintiff went to the house of the defendant, to demand a debt, which the defendant said he could not pay him; angry words ensuing, and the defendant told the plaintiff to leave his house, which the latter refused to do unless he was paid; and the defendant then called in a police officer, and had the plaintiff taken into custody, and he was locked up at the watch-house: it was holden that the defendant, under these circumstances, would have been justified in turning the plaintiff out of his house, but he was not warranted in having the plaintiff imprisoned. *Green v. Bartram*, 4 C. & P., 308.

That before the assault was committed, the plaintiff was required to leave the house, either by the defendant, or some person for him, and that he refused to do so. This is actually necessary to the justification, where the plaintiff has entered the house quietly; see *Jelly v. Bradley*, 1 C. & M., 270; but if he have entered it with force or violence, the occupier may turn him out (using no more force than is necessary) without any previous request to leave the house. *Tullay v. Reed*, 1 C. & P., 6.

That the defendant thereupon turned him out. Only so much force should be used, as was necessary to turn the plaintiff out. If, indeed, the plaintiff had attempted to make a forcible entry into the house, the defendant might have opposed force to force, and might justify it in answer to any action against him for doing so; see *Weaver v. Bush*, 8 T. R., 78. But where the plaintiff has entered quietly, and refuses afterwards to leave the house upon request, such force only should be used as is sufficient to overcome the resistance; *Green v. Goddard*, 2 Salk., 641; see *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 502. A steward of races is justified in ordering the holder of a ticket admitting him to a stand, to quit it, without assigning any reason, on returning the price of the ticket, and, after a reasonable time may force him to leave, though such holder had not misconducted himself, and, but for the order to quit, would have been justified by the purchase of the ticket in remaining there. *Wood v. Ledbitter*, 14 L. J., Ex., 161.

Reasonable chastisement.—The master of an apprentice may justify the moderate correction of his apprentice for misconduct; and the master of a ship may justify flogging and imprisonment for mutiny and disobedience.

Prior conviction or discharge by a Justice of the Peace for the same assault.—By stat. 9 Geo. IV., c. 31, s. 27, it is enacted, that “where any person shall unlawfully assault

or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding altogether, with costs (if ordered), the sum of 5*l*."

If the justices, upon the hearing of the case, "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." s. 27.

And "if any person against whom any such complaint shall have been preferred, for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for the non-payment thereof: in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." s. 28.

Where a party, on being summoned under this act, appeared and pleaded "not guilty," and the prosecutor then withdrew his complaint, and the defendant was discharged, it was held that this was a hearing and dismissal entitling the defendant to a certificate, and that the facts constituted a good defence to an action for the same assault. *Tunnicliffe v. Tedd*, 17 *L. J., M. C.*, p. 67.

Payment into Court.]—The defendant cannot in general in actions for assault, in the superior courts, pay money into court, for the statute 3 & 4 Will. IV., c. 42, s. 21, which empowers the defendant to pay money into court in personal actions, excepts actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation and seduction. In all actions in the County Courts the defendant may pay into Court such sum as he shall think a full satisfaction for the demand of the plaintiff, together with costs; 9 & 10 *Vict.*, c. 95, s. 82; *ante*, p. 106. The money must be paid in five clear days before the return of the summons. *Rule 15*.

ACTION FOR FALSE IMPRISONMENT.

In an action for false imprisonment, the plaintiff must prove the fact of imprisonment, and the special damage, if any; *Roscoe*, 6th edit., p. 476. The action is generally

brought for "assault and false imprisonment," as the fact of imprisonment frequently includes an assault.

Proof of imprisonment.—Actual confinement within four walls is not necessary to constitute imprisonment. If a man compel another to stay in any house or place against his will, he imprisons that other just as much as if he locked him up in a room; and compelling a man to go in a certain direction, against his will, may amount to imprisonment, but the mere forcibly preventing him from proceeding in a particular direction is not an imprisonment. *Bird v. Jones*, 15 L. J., Q. B., 32.

It is not necessary, to constitute an imprisonment, that a man's person should be touched; but if a constable, having a warrant against a man, show it to him, and the man go voluntarily with him before the magistrate, and the charge be then dismissed; this is not such an arrest as will support an action for false imprisonment; *Arrowsmith v. Le Mesurier*, 2 New. Rep., 211. But where, on a party being given in charge to a constable, the constable said to him, "You must go with me," to which the party answered, "Very well," and went with him accordingly; it was held, that as he went with the constable, in order to prevent actual force being used, it was an arrest and an imprisonment, for which an action would lie; *Pocock v. Moore, Ry. & M.*, 322; see *Peters v. Stanway*, 6 C. & P., 737. And in all such cases, it is a question for the jury, whether the plaintiff went voluntarily without compulsion, or whether he merely submitted to go, knowing that force would be used if he did not. But making a charge against a man, whilst he is actually in custody for another offence, will not subject the party making it to an action for false imprisonment. *Barber v. Rollinson*, 1 C. & M., 330; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 506.

The action may be brought, not only against the party who actually imprisoned the plaintiff, but against any person who caused him to be imprisoned. If a master imprison a man in a house, lock the door, deliver the key to his servant, and command him to keep him safe, and he does so accordingly, this is an imprisonment by the servant as well as the master, he having notice that the man was imprisoned in the house; *Vin. Abr., Imprisonment*, c. 1. If a man desire a constable to take another into custody, he thereby renders himself liable to an action for false imprisonment, if the imprisonment be unlawful. So, if a man tell a police officer to take charge of another, and the policeman do so, this is the same as telling the policeman to take him into custody, and is sufficient to support an action for

false imprisonment against the party; *Wheeler v. Whiting*, 9 C. & P., 262. But if he merely make a statement to the policeman, leaving it to him to act or not as he thinks proper, and the policeman arrest the party, the remedy for the party arrested, against the complainant, if the statement was false, is not an action for false imprisonment, but for maliciously making the statement whereby the plaintiff was imprisoned; *vide Hopkins v. Crow*, 7 C. & P., 373. It must be borne in mind, however, that an action for malicious prosecution cannot be tried in the County Court; 9 & 10 Vict., c. 95, s. 58. So that if an action for false imprisonment is brought against a party, and it appears that the proper form of action was for a malicious prosecution, the objection is not simply to the form of the plaint but to the jurisdiction of the Court; for the only remedy the party has is an action on the case in one of the superior courts.

If a man complain to a magistrate, on a subject matter over which the magistrate has a general jurisdiction, and the magistrate thereupon grant a warrant, under which the party complained against is apprehended; the complainant is not liable as for false imprisonment, although the particular case be one in which the magistrate had no authority to act. But even in such a case, where the complainant accompanied the constable, who had the execution of the warrant, and pointed out to him the person to be apprehended, it was holden that this was evidence to go to the jury, of his participation in the arrest; *West v. Smallwood*, 3 M. & W., 418. If a man, however, assist a constable in apprehending a person for an alleged offence, being called upon to do so, or in detaining a person who has been so apprehended, this will not subject him to an action although the constable may have acted irregularly in the arrest, or be otherwise liable to an action at the suit of the party apprehended. *See Archbold's Nisi Prius*, vol. i., 2nd edit., p. 505, and cases there cited.

An attorney who deliberately directs the execution of a bad warrant may be sued in an action for false imprisonment. *Green v. Elgie*, 14 L. J., Q. B., 162.

In regard to the liability of a magistrate or justice of the peace, the rule is, that where he acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information upon a supposed charge of felony, he is liable to an action of trespass; *Morgan v. Hughes*, 2 T. R., 225. But if there be an information, it matters not whether it is, or purports to be, founded on inadmissible evidence; *Cave v. Mountain*, 1 M.

§ G., 257. So, where a magistrate commits a person for re-examination for an unreasonable time, he is answerable for an action of trespass; *Davis v. Copper*, 10 B. & C., 28; and whether reasonable or not, is a question for the jury if there be one. *Cave v. Mountain*, *supra*.

In actions against a justice of the peace for any thing done by him in the execution of his office, notice must be given to him, which notice must clearly and explicitly contain the cause of action; *see stat. 24 Geo. II., c. 44*. And in actions against persons filling judicial and official situations, for anything done in such capacity, the plaintiff is generally required by the statute which confers the particular powers, to give notice before commencing the action; as for proceedings under the Malicious Trespass Act, 7 & 8 Geo. IV., c. 30, s. 41; and where such notice is requisite, the stat. 5 & 6 Vic., c. 97, s. 4, after reciting that it was expedient that the law should be uniform with respect to notice of action, enacts that "in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced, and such notice of action shall be sufficient, any Act or Acts to the contrary thereof notwithstanding." *And see* 9 & 10 Vict., c. 95, s. 138.

Where notice is necessary, the plaintiff must be prepared at the trial with proof of the service. The form of the notice is regulated by the language of the statute applicable to the particular case; as to notice to Justices under the above statute, 24 Geo. II., c. 44, *see Martin v. Upcher*, 11 L. J., Q. B., 291; *Breeze v. Jerdein*, 12 L. J., Q. B., 234; *Jacklin v. Fysche*, 15 L. J., Ex., 102; and as to notice to special constables, under 1 & 2 Wm. IV., c. 41, s. 19, and 2 & 3 Vict., c. 93, s. 8, *see Jones v. Nicholls*, 14 L. J., Ex., 42.

And as to the meaning of the words "anything done, &c., in pursuance of an Act," *see Palmer v. Grand Junction Railway Company*, 7 Dowl., 232; *Norris v. Smith*, 10 A. & E., 188; *Shatwell v. Hall*, 2 Dowl., N. S., 567; *Stamp v. Sweetland*, 14 L. J., M. C., 184; *Kine v. Evershed*, 16 L. J., Q. B., 271.

Defence.—The defendant may justify under civil or criminal process or warrants, or a constable, and in some cases a private person, may justify an arrest without warrant, or a jailor may justify the detention of the plaintiff. It would be beyond the limits of this work to enter into the facts constituting defences of this description. Many of the facts constituting a defence to an action for assault are applicable to this action. *See ante*, p. 239.

INJURIES TO THE PERSON ARISING FROM NEGLIGENCE OR CARELESSNESS.

§ 1. *Negligence in General.*

§ 2. *Negligent Driving.*

§ 3. *Keeping Dangerous Animals.*

NEGLECT IN GENERAL.

If an act be done without due caution, or in a negligent manner, it is the subject of an action, although the party had no design by it to do an injury to any person. If, for instance, a soldier, for want of due caution, wound a man by a discharge of his gun whilst exercising, an action lies; *Weaver v. Ward, Hob.*, 134. So, where the defendant in uncocking his gun discharged it, and wounded the plaintiff, who was then standing by, and looking at him. *Underwood v. Hewson, Strange*, 596. If two persons be fighting, and one of them unintentionally strike a third, he is answerable in trespass; and the absence of intention can only be urged in mitigation of damages; *James v. Campbell, 5 C. & P.*, 372.

If a man ride an unruly horse, for the purpose of breaking it, in a place much frequented by people, and the horse run away with the rider, and run over a man and hurt him, trespass will lie. But if under other and ordinary circumstances, a horse from sudden fright run away with the rider, and run against a man, this is not actionable; *Gibbons v. Pepper, 2 Salk.*, 637. So in all cases where a corporal injury is done unintentionally, if it cannot be imputed to the neglect of the party committing it, or to a want of due caution upon his part, no action will lie for it; see *Wakeman v. Robinson, 1 Bing.*, 213. In all the above cases, although there was no intention to commit the injury, the plaintiff may legally describe it as an "assault," but it will be preferable to describe the case according to the facts.

The occupier of a house is bound to rail in the area, and if an accident happen, it is no defence that the premises had been in the same situation for many years before the defendant came into possession of them; *Coupland v. Hardingham, 3 Camp.*, 398. Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state, whereb an accident happened, the landlord was held liable; *Leslie*

v. Powds, 4 *Tunst.*, 849; *Payne v. Rogers*, 2 *H. Bla.*, 349. But it seems that the owner of fixed property who enters into a contract for its repairs, and parts with all controul over the conduct of them, is not liable for any mischief which the contractor may occasion in the progress of the work by negligently depositing materials in the highway in the neighbourhood of the property, or other acts of a like nature; *Burgess v. Gray*, 14 *L. J.*, *C. P.*, 184; and the owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession, unless he is a party to it; but if the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term. *Rich v. Basterfield*, 16 *L. J.*, *C. P.*, 273.

A very important distinction exists between injuries arising from wilful acts and injuries the result of negligence or carelessness, in regard to the liability of the parties. Where an injury is the immediate effect of any wilful act of the party, the action can only be maintained against the party committing it or participating in it; but where an accident occurs from want of skill, or carelessness or negligence, the party injured may recover not only against the person whose want of skill, carelessness, or negligence, caused the injury, but, in general, against his master or employer.

The negligence resulting in accidents or injuries to the person are, of course, of very various descriptions, as exemplified in the above instances. Those, however, which perhaps most frequently bring into question the rights and liabilities of the parties, arise from negligent or careless driving, and from keeping dangerous animals.

NEGLECTED DRIVING.

In an action for negligent driving, actual negligence must be proved; and it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence. Proof that a stage-coach broke down raises a presumption that the accident arose either from the unskilfulness of the driver, or the insufficiency of the coach; *Christie v. Griggs*, 2 *Camp.*, 79; *Curtis v. Drinkwater*, 2 *B. & Ad.*, 169. And the owner is liable for the insufficiency of the coach, although the defect be out of sight, and not discoverable upon ordinary examination; *Sharp v. Grey*, 9 *Bing.*, 457. Where a coach, which is overloaded, breaks down, the excess in the number of passengers has been held to be conclusive evidence of the acci-

protect his property, but not to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. *Per Tindal, C. J., Sarah v. Blackburn, M. & M.*, 505; *see also Blackman v. Simmons*, 3 C. & P., 138; *Roscoe*, 6th edit., p. 356.

INJURIES TO PROPERTY.

ACTIONS FOR TAKING OR KEEPING POSSESSION OF PROPERTY.

- § 1. *Where taken wrongfully or with force.*
 § 2. *Where taken rightfully or without force, but wrongfully detained.*
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The party who has a right to goods and wishes to recover possession of them, may, in many cases, bring an action on contract to recover the goods themselves or their value, or he may bring an action of *tort* to recover damages for the wrongful taking or detention. Or in some cases he may bring an action on contract to recover the goods, and also an action of *tort* to recover damages for the taking. The cases in which a party may bring an action on contract are mentioned in another part of the work, *ante*, p. 166.

It frequently happens that the plaintiff complains of a trespass for entering his house as well as for taking his goods, but actions for injuries to real property so frequently involve a question of title, as to render any statement of the necessary evidence in these cases out of place here. For the stat. 9 & 10 Vict., c. 95, s. 58, provides that the County Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments shall be in question. *See ante*, p. 1.

EVIDENCE FOR THE PLAINTIFF IN AN ACTION FOR WRONG- FULLY TAKING GOODS.

The wrongful taking of goods is in law a trespass. It is not only in cases of actual violence that an action of trespass may be maintained. It lies also in all cases of injury, direct and immediate, and not merely consequential, committed to the property or person of another, where the law implies force, from the circumstance of the act being committed without the consent of the party injured. Thus, taking possession or carrying away his goods, although without force, if done without his consent, is a trespass;

and unless the act can be excused or justified, an action will lie for any damage occasioned by it.

To support an action for wrongfully taking goods, the plaintiff must prove the possession of the property, and the taking of it by the defendant.

The plaintiff must either have been in the actual possession of the goods at the time of the taking, or must have the property (absolute or special) in the goods, and the right to immediate possession. *Harrison v. Dixon*, 12 M. & W., 142.

Actual possession.—Possession of itself gives the party a right to maintain trespass against all except the real owner; *Nelson v. Cherill*, 7 Bing., 683; *Ashmore v. Hardy*, 7 C. & P., 501. And possession by the plaintiff as bailee, will be sufficient to enable him to maintain the action. If the goods bailed be wrongfully taken from him by a stranger, the action may be brought either by the bailee, although he be a gratuitous bailee; or by the bailor, if he have the right to the immediate possession. *Ward v. Macauley*, 4 T. R., 489; *Hall v. Pickard*, 3 Camp., 187.

Property, and right to immediate possession.—The owner of the goods himself, if he have also the right to immediate possession, may maintain the action, although he may never have been in possession of them; the ownership and right to immediate possession, are deemed in law to amount to a constructive possession. Therefore the lord of a manor may, before seizure, maintain trespass for an estray or wreck taken by a stranger; *per Ashurst, J.*, 1 T. R., 480. So an executor may maintain the action for a trespass to the goods of his testator, committed before he actually took possession of them, and even before probate; *Fisher v. Young*, 2 Bulst., 653. If the owner of goods at York give them to A who is in London, and before A has taken actual possession of them, a stranger wrongfully take or injure them, A may maintain trespass against him; *Bro. Trespass Pl.*, 303; but if a bailee of the goods had given them to A, he could not have maintained the action, because he acquired no property in the goods by the assignment from a person who had but a special property in them; *Id.*, Pl., 216. Where a woman commissioned her brother to buy a cow for her, and he bought one accordingly, but before the cow could be delivered to her, and indeed before she had assented to the purchase, the cow was taken by the defendant; it was holden that this woman had a sufficient property in the cow to maintain trespass for the taking of it; *Thomas v. Phillips*, 7 C. & P., 573. So, if a certain specific personal chattel, be bequeathed to A, and after the death of

the testator, and before any delivery of the chattel to the legatee by the executor, a stranger wrongfully take or injure it, A may maintain an action against him; *Bro. Trespass*, pl. 25; but if the testator had bequeathed to him a third part of his goods, or any other undefined portion of them, he could not maintain this action for a trespass to them committed before the goods were actually delivered to him by the executor, for until then he had no general property in them. *Id.*; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 482. But in these cases of constructive possession, it must appear that the plaintiff had the right to immediate possession, at the time of the trespass. And therefore where, in a mortgage of a house, fixtures, utensils of trade, and other things, a right was given to the mortgagor to enter and take possession on the 24th of June, if the principal and interest were not then paid; and on the 10th June the goods and fixtures were seized under a *fi. fa.* against the mortgagor, and sold on the 22nd; it was holden that the mortgagee could not maintain an action for this taking, for he had no right of possession until the 24th, which was after the trespass; *Wheeler v. Montefiore*, 11 L. J., Q. B., 34; and see *Bradley v. Copley*, 14 L. J., C. P., 222. And where A being indebted to B, it was agreed that B should keep A's cow till the debt was paid, that A might drive it away every morning and night to be milked, and if he did not return it, that B might take it whenever or wherever he found it; and A drove the cow away and kept it three weeks, whereupon B retook it: it was held that A was not entitled to maintain trespass against B, who had a lien on the cow. *Richards v. Symons*, 15 L. J., Q. B., 35.

As to the liability of the defendant, see *post*, p. 262, and 9 & 10 Vict., c. 95, s. 137.

EVIDENCE FOR THE DEFENDANT.

Denial of property.—It lies upon the plaintiff to prove that he had a sufficient interest in the property to maintain the action; but the defendant may prove that at the time of the trespass, the goods were not in the possession of the plaintiff, nor had he any right of property in them; or, supposing him to have the right of property, still that he had not then the right to immediate possession. *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 484.

Justification.—The defendant may confess the trespass, and the plaintiff's actual or constructive possession, but avoid it by other matter. Thus, a landlord or his bailiff may justify taking goods as a distress for rent, overseers for poor-rates, a sheriff or his bailiffs under a writ of execution;

or a defendant may justify taking cattle *damage feasant*; and a commoner may justify distraining the cattle of a stranger upon the common.

† The last-mentioned defences not unfrequently involve a question of title to "corporeal or incorporeal hereditaments," and if so, the County Court has no jurisdiction to try the action. *See ante*, p. 1.

Where, however, the plaintiff complains, as is frequently the case, as well for breaking and entering his house or close as for taking his goods, the warrant or process which justifies the one may also justify the other. It may be observed here, that a sheriff's officer is not justified in entering and searching a stranger's house to arrest a defendant under a writ, although such defendant may have resided there immediately before the entry, and although the officer has reasonable cause to suspect that the defendant is in the house, if the fact be that he was not in the house at the time of the entry and search. *Morish v. Murrey*, 13 L. J., *Ex.*, 261.

Plaintiff's bankruptcy.—In general the defendant may set up the plaintiff's bankruptcy to an action of trespass for taking or injuring goods, but where it is brought for injuries, independently of the loss of the goods, as for the annoyance and disturbance occasioned by their seizure, the plaintiff's bankruptcy is no bar; for although the property and rights of action of a bankrupt to which he was entitled for the purpose of recovering in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld, or taken from him, pass to the assignees, yet causes of action not falling within this description, but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy, whether his property were diminished or impaired, or not, do not so pass; and even where loss or diminution has accompanied or followed a wrong of this description, the primary or personal injury to the bankrupt, being the principal or essential cause of action, still remains in him, and does not vest in the assignee, either as his property or his debts. *Rogers v. Spence, in error*, 15 L. J., *Ex.*, 49.

Evidence for the plaintiff in reply.—The plaintiff in general can only deny any matter of defence set up by the defendant, the nature of that defence being inconsistent with the right of the plaintiff to support the action. He cannot, therefore, *confess and avoid* the matter alleged in justification. There is an important exception to this rule, however, which requires to be noticed; namely, where the justification is confessed, but the plaintiff proves matter

which shows that the defendant thereby became a trespasser *ab initio*;—that the defendant, although originally justified in what he did, yet, by what he afterwards did, he lost all right to benefit by his justification. As if a person lawfully take a beast as an estray, yet if he afterwards abuse it, by riding or working it, he becomes a trespasser *ab initio*; and in an action of trespass against him for taking the beast, if he allege that he took it as an estray, the plaintiff may reply his having ridden or worked it, and it will be a good answer; *Oxley v. Watts*, 1 T. R., 12; *Bul., N. P.*, 81. In like manner, where the defendant avers that he took the plaintiff's cattle *damage feasant*, the plaintiff may show that the defendant afterwards abused the distress, and so show him to be a trespasser *ab initio*; see *Wilder v. Speer*, 8 A. & E., 547; as of the defendant having sold more animals distrained by him than were necessary to repay expenses of keep; see *Layton v. Hurry*, 15 L. J., Q. B., 244. So, if the owner of a several fishery seize nets as being in his waters *damage feasant*, and plead this to an action of trespass, the plaintiff may shew that the defendant cut the nets; see *Raynal v. Champernoou*, Cro. Car., 228. And the like in other cases. *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 484.

Where, however, the action is in fact brought for the subsequent injury, the plaintiff ought not to frame his plaint as if he complained of the *taking* of the goods, which would be calculated to mislead the defendant, but for the injury. See *post*.

EVIDENCE FOR THE PLAINTIFF IN AN ACTION FOR WRONGFULLY DETAINING GOODS.

There are many cases in which a party has a right to maintain an action for goods, &c., which having lawfully or without force come into the defendant's possession, he refuses to redeliver, or has exercised some act inconsistent with his limited right or interest in it. In many such cases the plaintiff has an option to frame his plaint as an action on a contract, and to recover the goods themselves or their value, or he may frame his plaint for the *tort*, and recover damages, which will in general be the value of the goods. So that the result of the action, whether on contract or for *tort*, is very often so much the same in effect as to render the adoption of the one or the other a mere technical choice. It is to be observed, however, that the action for the *tort* may often be supported where an action on

contract could not, arising either from the nature of the goods, or the circumstances of the case. *See ante*, p. 167.

The language or form of the plaint in this action for *tort* may be for *trover*, or for *converting* the plaintiff's goods to the defendant's use, a 'conversion' in law being one of the facts which the plaintiff must prove. It is to be observed, that the action of trover in the superior courts is not confined to the case of goods *rightfully* acquired, for where goods are wrongfully taken the plaintiff may waive the trespass and sue in trover for the detention.

In order to support an action for detaining or '*converting*' property, which was originally taken lawfully or without violence, the plaintiff must prove, 1st, such a title in himself to the goods in question as shows that he had the right of property in him, and the right to their immediate possession; 2ndly, a *conversion* of the goods by the defendant; and lastly, the amount of damages claimed.

The plaintiff's title to the goods.—In order to maintain this action, the plaintiff must in general have a right to the present possession of the goods, as well as the property in them; *Gordon v. Harper*, 7 T. R., 9; *Bradley v. Copley*, 14 L. J., C. P., 222. Possession is a sufficient title in this action as against a mere wrong-doer, as well as in an action for a forcible taking of goods. A bailee may maintain the action, even although he be merely a gratuitous bailee; *Nicolls v. Bastard*, 2 C. M. & R., 659. And if the plaintiff have the absolute right of property and the right to immediate possession, he may maintain the action, even although he have never been in actual possession. It is sufficient if there be an appropriation of the thing to him, and an assent by him to that appropriation; *see Wilkins v. Bromhead*, 13 L. J., C. P., 75. And the action may be maintained for an article pawned, by a person who afterwards purchased it of the pawnor; *Franklin v. Neate*, 14 L. J., Ex., 59. So, if a son receive the amount of a bill for his father, and give it to another person, the father may maintain an action against the latter for it, although he never had the actual possession of it. *Anon.*, 1 Salk., 289; *Bul.*, N. P., 35.

Where A sold B twenty sacks of flour, and gave him an order on his wharfinger for them, and the wharfinger accepted and filed the order, and delivered a part of them, which he said was all he could spare: it was held that the purchaser might maintain an action against the wharfinger for the remainder; *Gillett v. Hill*, 2 C. & M., 530; *Smith v. Cook*, 2 C. & P., 276. But where goods were sold, to be paid for by instalments, the balance to be paid before removal, and the vendor allowed the purchaser to deposit the

goods in a kiln on the vendor's premises, under lock and key, and which key he gave to the vendee, but he retained the key of the external inclosure: it was held that the purchaser, not having paid the balance, had not such a possession as would enable him to maintain an action of *trover* for the goods against the vendor, who had wrongfully removed and sold them; *Milgate v. Kebble*, 3 M. & G., 100. A mortgagee of goods assigned to him, but remaining in the mortgagor's possession, under a mortgage deed stating that the mortgagor shall possess the goods until default, cannot, where he has not demanded the money, maintain an action of *trover* against a sheriff who sells the goods under an execution against the mortgagor, as the mortgagee has not in such case the right to immediate possession; *Bradley v. Copley*, 14 L. J., C. P., 222. Where a father verbally gave his son a colt, and after his father's death his executor refused to give up the colt to him; it was held that this verbal gift did not give the property to the donee, so as to enable him to maintain an action; *Irons v. Smallpiece*, 2 B. & Ald., 551. But where a father gave his son (a boy of sixteen years of age) a watch and other things, and delivered them to him, it was held that the father could not afterwards maintain an action for them against a stranger who wrongfully detained them; for the right was not in him, but in his son; *Hunter v. Westbrook*, 2 C. & P., 578. So where goods are condemned as forfeited according to the laws of excise, the proprietor cannot afterwards maintain an action for the recovery of them; for the property is no longer in him; *Ekins v. Smith*, Raym., 336. Where a man orders a certain article to be made for him, although he pay for it before-hand, yet he acquires no property in it until it is completed and delivered to him, or at least appropriated to him with his assent; see *Wilkins v. Bromhead*, 13 L. J., C. P., 74; before which time he cannot maintain this action of tort to get possession of it; his remedy is by an action for not delivering goods: *vide ante*, p. 155. So the action will not lie by the purchaser of goods, which form part of a larger quantity belonging to the seller, unless there has been a separation of the specific part sold, from the rest; *Austin v. Craven*, 4 Taunt., 644. Where a servant was hired at the wages of thirty guineas a year and a suit of clothes, the clothes being provided for him at the time of his entering the service: it was holden that although he was wrongfully turned off within the year, yet that he could not maintain any action to recover the clothes, as the clothes did not become his property until he served the year; *Crocker v. Molyneaux*, 3 C. & P., 470. So, where

the plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver, it was held that the plaintiff could not maintain this form of action for the watch, on proof that the candlesticks were of base metal; *Emanuel v. Dane*, 3 Camp., 299. His remedy would be an action for damages for the misrepresentation.

One joint tenant, tenant in common, or parcener, cannot maintain an action against his companion for a thing still in his possession, for the possession of one is the possession of both; *Blackham's Case*, 1 Salk., 290. But if one tenant in common destroy the thing in common, or so dispose of it as to render it impossible that the other should have the use of it, the latter may bring trover; *Fennings v. Lord Grenville*, 1 Taunt., 241; and see *Higgins v. Thomas*, 15 L. J., Q. B., 261. Thus, a sale of the whole of the property by one of them, adversely and in exclusion of the other, would, it seems, be a conversion of the other's share, for which he might maintain an action; *Barton v. Williams*, 5 B. & Ald., 395.

Where a sheriff seizes goods under an execution, he has such a special property in the goods, that he may maintain trover for them; *Wilbraham v. Snow*, 2 Saund., 47; *Bul. N. P.*, 33.

An action of trover will not lie for goods irregularly sold under a distress, the remedy given by the stat. 11 Geo. II., c. 19, s. 19, being a special action on the case; *Wallace v. King*, 1 H. Bl., 13. And although in the County Court there is no distinction of actions by writ, the form of plaint and the evidence to support the action for irregular distress, must correspond with the nature of the remedy given by the statute. The party who buys goods at such a sale, has such a title as will enable him to maintain trover in respect of them; *Lyon v. Weldon*, 3 Bing., 334. But where goods were seized and sold under a distress upon a conviction, which was void; it was holden that the purchaser could not maintain an action for them, as no property passed by the sale; *Lock v. Selwood*, 1 Q. B., 736. On the other hand, the owner of goods improperly taken for a distress or in execution against a third party may maintain this action; as where a carriage sent to a commission agent for the purpose of being sold is distrained for the rent of the premises upon which it is exposed for sale; *Findon v. M'Laren*, 14 L. J., Q. B., 183. Where the plaintiff being the owner of a piano, lent it to A, whose landlord seized it under a distress for rent, and the landlord remained in possession of the piano for a fortnight, when a sheriff's officer seized it under an execution against A, and removed it to the pre-

mises of the defendant, an auctioneer, who afterwards sold it; it was held that the plaintiff might maintain an action of trover against the defendant, but that the landlord could not maintain the action against him, his remedy being against the sheriff's officer for pound breach. *Turner v. Ford*, 14 L. J., Ex., 215.

If goods be stolen, the owner is not allowed (on grounds of public policy, which prevents the assertion of a civil right in respect of which a felony has been committed) to bring an action for them against the party who stole them, either before or after conviction, or against him and others jointly. And it is doubtful whether a person can recover goods by action from one who has received them knowing them to be stolen; *White v. Spettigue*, 14 L. J., Ex., 99; but he may maintain the action against a person who bought them from the thief by a *bona fide* sale (not in market overt) although no steps have been taken to bring the thief to justice. But the *bona fide* purchaser of goods in market overt, or places of public sale, cannot be sued; but if he did not purchase them in market overt he is liable, although he may in his turn have sold the goods either privately or in market overt; *Ibid.*; *Peer v. Humphrey*, 2 A. & E., 495; see *Stone v. Marsh*, 6 B. & C., 551, 564; *Marsh v. Keating*, 1 Bing., N. C., 198, 217. But where goods are purchased in market overt, and sold again to another before conviction, the owner cannot maintain an action for them against the first buyer, although he has given him notice of the robbery whilst they were in his possession; *Horwood v. Smith*, 2 T. R., 750. And a sale within the City of London, in an open shop, of goods usually dealt in there, is a sale in market overt for this purpose, though the premises are a warehouse, and not sufficiently open to the street for a person on the outside to see what passed within. *Lyons v. De Pass*, 11 A. & E., 326.

Assignees of bankrupts are entitled to goods which a bankrupt at the time of his bankruptcy has, by the consent and permission of the true owner, "in his possession, order, or disposition," "whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner;" 6 Geo. IV., c. 16, s. 72; and consequently the assignees may maintain this action for such goods. It is quite beyond the limits of this work to enter into what particular circumstances bring goods within this section.

For what goods.—The things to which the plaintiff proves his title must be such as can be legally recovered in an action of *trover* in the superior courts. The plaintiff may recover any personal chattel, including bank notes, bills of exchange, and other negotiable instruments, an agreement,

although unstamped, money in or out of a bag, title-deeds, a hawk, or a parrot, musk cats, monies, &c., which are matters of merchandize, or dogs; coals, when severed from the mine; trees, when cut down; *vide Archbold's Nisi Prius*, vol. i., 2nd edit., p. 601. But the action will not lie for fixtures, whilst attached to the freehold, even although they be such as the tenant has a right to remove; *Mackintosh v. Trotter*, 3 M. & W., 184; and see *Sheen v. Rickie*, 5 Id., 175; *Wood v. Hewitt*, 15 L. J., Q. B., 247; but after they have been severed from the freehold, of course the action will lie for them; *Weston v. Woodcock*, 7 M. & W., 14; *Hitchman v. Walton*, 8 L. J., Ex., 31; *Dalton v. Whittom*, 12 L. J., Q. B., 55; 3 Q. B. Rep., 961; and see *Darby v. Harris*, 1 Q. B., 895. It will lie, however, for certain detached parts of machinery, which are not attached to the freehold, although the principal part of the machine may be; *Davis v. Jones*, 2 B. & Ald., 165; or for tapestry hangings, iron backs to grates, &c.; *Harvey v. Harvey*, 2 Str., 1141; or the like. *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 601.

The conversion of the goods by the defendant.—The plaintiff must prove some act of the defendant which shows that the latter claimed them, or done some act inconsistent with the owner's rights, or, in legal language, that he *converted them to his own use*.

If a man takes another's goods for the use of himself or a third person, it is a conversion, and therefore in the superior courts the plaintiff has often the option of proceeding either by an action of trespass, in which the *taking* is the essence of the offence, or by *trover* for the conversion; the result being much the same, as, in either action, if he succeeds, he generally recovers at least the value of the goods. In actions in the County Courts, however, the plaint should accord with the facts of the case; and when goods are improperly taken by another, it is the *taking* which the party naturally complains of, and therefore the plaint and evidence falls under the preceding head of actions for taking or keeping possession of goods where they were forcibly taken; see *ante*, p. 250. In some cases, however, the plaintiff may not be able to prove the act of taking by the defendant, and therefore in those cases he should frame his plaint for *the conversion of the goods*, to meet his evidence; for they would fall within the class now under consideration, viz., where the property was in fact rightfully or innocently taken, or there is no evidence to shew the contrary, but is wrongfully detained.

The fact that the defendant has converted the goods to his

use is generally proved in one of two ways. By some disposition of or dealing with the goods by the defendant, inconsistent with the plaintiff's right; or by his detention of them after they have been demanded by the plaintiff.

Conversion by act of disposition.—Any disposition of the goods of another, which is inconsistent with the right of dominion the owner has in them, amounts to a conversion.

If a person having the possession of another's goods, sells them with a view to appropriate the produce to his own use or the use of a third party; *Featherstonehaugh v. Johnson*, 2 *Moore*, 181; or if a person sends another's goods to an auctioneer to be sold for him, and they are sold accordingly, *Loeschman v. Machin*, 2 *Stark.*, 311, it is a conversion; but if he sell them for the owner's use it is not, unless the owner can show that he had no authority to do so; see *English v. Chartres*, 2 *Stark.*, 30; or if a constable sell goods under a warrant of distress upon a conviction, &c., it is not, for it is not a conversion to his own use; *Cuckson v. Winter*, 2 *M. & R.*, 313. Cancelling a bond, or a bill of exchange, or discounting a bill of exchange with another, *Alsager v. Close*, 10 *M. & W.*, 576, is a conversion; but merely receiving the money due upon them, is not; *Jones v. Fort*, 9 *B. & C.*, 764. If a carrier lose goods intrusted to him to carry, or a stable keeper a horse left with him for livery, it is not a conversion; for this is an omission, not an act of commission, and therefore no conversion; the plaintiff in such cases must frame his plaint for the negligence; see *post*, *Injuries to personal property arising from negligence*, &c. But if a carrier or warehouseman, &c., misdeliver a parcel, though by mistake, it is a conversion in law, as it is an act of commission; *Devereux v. Barclay*, 2 *B. & Ald.*, 702; *Youl v. Harbottle*, *Peake*, 49; but in this case, as in the preceding, there is no actual claim to or detention of the goods by the defendant, and it naturally falls within the same class of cases arising from negligence; see *post*. If a man do any thing which he is empowered by law to do, as to distrain cattle, or impound them, it is no conversion; but if after distraining them, he work them, it is, and he is liable in this action, although he have returned the cattle. Where A having taken possession of land belonging to B, dug chalk from the soil and converted it into lime, and B recovered in ejectment, and upon execution of the writ of possession turned A's servants off the premises, refusing them at the same time to allow them to remove the lime remaining on the premises, it was held that these facts did not necessarily amount to a conversion; *Thoroughgood v. Robinson*, 14 *L. J., Q. B.*, 87. So, if a man do that which

he is authorized by the plaintiff to do, as if a bill of exchange be given to him to get discounted, and he accordingly get it discounted, but misapplies a portion of the produce of it, this is no conversion of the bill. *Palmer v. Jarman*, 2 M. & W., 281; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 602.

Conversion by detention.—Where there is no evidence of an actual conversion by disposition of the goods, proof of a demand of the goods made upon the defendant, and his refusal to deliver them up, will be evidence of a conversion, so as to support the action. And if the demand be made upon a wife, in the absence of her husband, and she refuse to give the goods up, this will be good evidence of a conversion to support an action against husband and wife; *Catterall v. Kenyon*, 3 Q. B., 310. If a demand be made upon a pawnbroker of a pledge, and the money due be tendered to him, —if he refuse to redeliver it, the action lies against him, the demand and refusal being good evidence of a conversion; *Ratcliff v. Davis*, Cro. Jac., 244. So a demand upon a person having a lien upon the goods, and a refusal by him, are evidence of a conversion, even although the amount of his lien be not tendered to him, if the lien be not assigned as the ground of his refusal. *Cannee v. Spanton*, 14 L. J., C. P., 23.

So, if the holder of goods refuse to deliver them up, until the owner pay or secure a debt which he owes him, it is a conversion; *Sharp v. Pratt*, 8 C. & P., 34; *Davies v. Vernon*, 14 L. J., Q. B., 30; and the same in all other such cases of refusal, on the alleged ground of lien, where the party is not entitled in law to the lien he claims.

But if the refusal arise merely from a *bonâ fide* doubt as to the plaintiff being entitled to the goods, *Vaughan v. Watt*, 6 M. & W., 492, or, where the demand is not made by the plaintiff himself, whether the party making it is authorized to do so, *Solomons v. Dawes*, 1 Esp., 83; or from the goods being attached in the hands of the holder, by process out of some court, *Verral v. Robinson*, 2 C. M. & R., 495; or because the party has demanded more goods than he was entitled to, *Abingdon v. Lipscomb*, 10 L. J., Q. B., 330; 1 Q. B., 776; or because the party making the demand was but one of two who jointly deposited the goods with the defendant, *May v. Harvey*, 13 East, 197; or because the goods are not in his hands, but in the hands of some other whom he names, *Carrol v. Hughes*, 2 Bing., N. C., 448; or where goods were saved from a fire, and the fireman refused to give them up without an order from his insurance company, *Alexander v. Southey*, 5 B. & Ald., 247; or where a gun was demanded of the defendant, and he

said it had burst, and that he would rather pay ten times the value than repair it, *Rushworth v. Taylor*, 12 L. J., Q. B., 80; 3 Q. B. Rep., 699; or where any feasible excuse is *bonâ fide* made, showing that the party does not wish to appropriate the goods to his own use, or in exclusion of the real owner. In these cases the refusal will be no evidence of a conversion. But a refusal to deliver them up, because another person has also demanded them, is evidence of a conversion; *Atkinson v. Marshall*, 12 L. J., Ex., 117. So, setting up a *jus tertii*, or keeping goods in order to maintain the title of a third party, is evidence of a conversion; *Id.*, per Parke, B. Where the defendant at first refused to give up the goods, but afterwards tendered them before action brought, it was holden that the action could not be maintained; *Heyward v. Seaward*, 1 Moore & Sc., 459. So, where the refusal was not by the defendant, but by her son, it was holden not to be sufficient, without proof that he acted under the defendant's special direction. *Pothonier v. Dawson, Holt*, 383.

The demand may either be verbal, or in writing; if in writing, it may be left for the defendant at his place of residence; *Logan v. Houlditch*, 1 Esp., 22. If there be a verbal, and also a written demand, at the same time, but neither referring to the other, evidence may be given of the verbal demand, without producing the one in writing. *Smith v. Young*, 1 Camp., 439; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 603-4.

Who liable for the conversion.—The action must be brought against the party who has been guilty of the conversion, or by whose orders or directions it has been done; or it may be against a person for whose benefit it has been done, and who has subsequently recognized and adopted it, in the same manner as in trespass for taking goods; *ante*, p. 252. A purchaser of goods privately sold to him by a person not having the right to dispose of them, is frequently liable; *see ante*, p. 258, as to the liability of persons in the case of stolen goods, and *post*, as to the protection of persons dealing with agents intrusted with goods. A *bonâ fide* purchaser of goods by private sale from a person who has hired them, may be sued for the goods in an action of trover; *Cooper v. Willomatt*, 14 L. J., C. P., 219. If a man lodge jewels sealed up in a bag with a banker, and the banker break open the bag to pawn the jewels to another, the owner may bring the action either against the banker or the pawnee; *Hartop v. Hoare*, 1 Wils., 8; 2 Str., 1167; *Bul.*, N. P., 33. If A having a bill drawn in his favour and accepted, indorse it to B for the purpose of raising money for him by negotiating it, and B give it to C, and

C place it in the hands of D, without consideration; A may maintain an action for it against D; *Coggerley v. Cuthbert*, 2 *New Rep.*, 170. There may be cases also where this action is maintainable against the very owner of the goods: as for instance, where a person entitled to the temporary possession of them delivers them back to the owner for an especial purpose, and the owner afterwards refuse to redeliver them after the special purpose has been answered; *Roberts v. Wyatt*, 2 *Taunt.*, 268; or where the owner pawns them, and the pawnee allows him to have them for a certain time, after which he refuses to redeliver them; or the like; see *Richards v. Symons*, 15 *L. J.*, *Q. B.*, 35. If goods be converted by a servant, at the command or by the directions of his master, it was formerly holden that no action would lie against the servant, but against the master only; *Mires v. Solebay*, 2 *Mod.*, 242; but this may very much be doubted, particularly where the act of conversion is an apparent wrong; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 600. Where a trader was on the eve of bankruptcy, and his place of business shut up, and a clerk of one of his creditors received certain goods from him for his master, and sold them for his master's use; it was holden that the assignees of the trader, who had afterwards become bankrupt, might maintain an action for these goods against the clerk; *Perkins v. Smith*, 1 *Wils.*, 328; and see *Stephens v. Elwall*, 4 *M. & Sel.*, 259. So, where title-deeds were in the hand of an attorney, as agent for his client, it was holden that this action would lie against him for them, by the party entitled to them; *Davies v. Vernon*, 14 *L. J.*, *Q. B.*, 30. A landlord who authorizes a distress, but directs that it shall be confined to goods on the tenant's premises, is not liable in an action of trover for goods distrained by the bailiffs (by mistake) not on the premises, unless he ratifies or adopts their acts; *Lewis v. Read*, 14 *L. J.*, *Ex.*, 295. And where the officer of the County Court seizes goods of a third party under an execution, the plaintiff is not liable. *Bryant v. Hatton*, *C. C. Chron.*, 190.

The action will lie, not only against individuals, but against corporations also; *Yarborough v. Bank of England*, 16 *East*, 6.

Where the action is against several, the plaintiff cannot succeed against all, without proving that they all were guilty of a joint conversion. And therefore, where the plaintiff brought the action against two bankrupts and their two assignees, and proved that the bankrupts, before their bankruptcy, received and afterwards disposed of the goods by way of pledge, having no authority to do so; and that the assignees, after the bankruptcy, took possession of the

goods, and refused to deliver them to the plaintiff on demand; and the jury found all the defendants guilty: the court held that the evidence did not warrant such a finding. *Nicoll v. Glennie*, 1 *M. & Sel.*, 588.

Damages.—In estimating the damages, the judge or the jury are not necessarily limited to the value of the goods at the time of the conversion, but may, in their discretion, find as damages the value at any subsequent time; *Greening v. Wilkinson*, 1 *C. & P.*, 625. And if the plaintiff can prove any special damage, as the loss of work for want of tools in a trade, he may recover it; *Bodley v. Reynolds*, 15 *L. J.*, *Q. B.*, 219. And in an action against the sheriff, where he has sold the goods, the jury are not limited to the sum produced by the sheriff's sale, but may give as damages the real value; *Whitehouse v. Atkinson*, 3 *C. & P.*, 344; but in actions by assignees, if the sheriff's sale appear to have been a fair one, the jury usually give as damages the amount produced by it, because the plaintiffs, if they had the goods, must have also disposed of them by public sale; and the jury, in such a case, may even deduct the expenses of the sale; *Clarke v. Nicholson*, 1 *C. M. & R.*, 724. In the action for a bill of exchange, the proper measure of damages is the amount of the principal and interest due upon the bill at the time of the conversion; *Mercer v. Jones*, 3 *Camp.*, 477. Although it appear that the defendant has merely deposited it with another person as security for an advance upon it to about half the amount; *Alsager v. Close*, 10 *M. & W.*, 576. So in an action for an unstamped guarantee of the defendant of which he had obtained possession, it was holden that the proper measure of damages was the sum the plaintiff might have recovered in an action upon it. *M'Leod v. M'Ghie*, 2 *M. & G.*, 326; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 612.

EVIDENCE FOR THE DEFENDANT.

Lien.—That the defendant has a lien on the goods, or a right to detain them, is the most usual defence to this action.

There are two species of liens, namely, *particular* liens and *general* liens. *Particular* liens are, where persons claim a right to retain goods, in respect of labour or money expended on such goods, and these liens are favoured in law. *General* liens are claimed in respect of a general balance of account; and these are founded on express agreement, or are raised by implication of law, from the usage of trade, or from the course of dealing between the parties, whence it may be inferred that the contract in question was

made with reference to their usual course of dealing. *Selwyn's Nisi Prius*.

Particular lien.—Where goods are expressly pledged as security for a debt or other purpose, the party with whom they are deposited is entitled to retain them until the payment or discharge of the debt or the determination of the contract.

A pawnbroker is empowered by statute to sell goods pledged, if not redeemed at the expiration of a year, or at most of fifteen months; but if he does not exercise the right, and still retains the goods, he is bound, even after that period, on being tendered the amount of principal and interest, to redeliver the goods to the owner; *Walter v. Smith*, 5 B. & Ald., 439; whether he be the person who originally pledged them, or some other person to whom the pawner sold or assigned them. *Franklin v. Neate*, 17 L. J., Ex., 59.

In general, where a person bestows his labour on a particular article delivered to him in the course of his business, he has a lien upon such article for the amount of his charge. Millers have a lien on the produce of corn which they have ground, for the price of grinding; a tailor on the cloth delivered to and made up by him; *Blake v. Nicholson*, 3 M. & Sel., 169. A trainer has a lien on a race-horse for training him; *Bevan v. Waters*, 1 M. & M., 236; and see *Scarfe v. Morgan*, 4 M. & W., 270. But the case of agistment does not fall within this principle, as the agister does not confer any additional value on the article by the exertion of skill, but simply takes in an animal to feed it. Hence an agister of milch cows has no lien; *Jackson v. Cummins*, 5 M. & W., 350; and a livery-stable keeper has no lien upon the horses in his stable for their keep, without an express agreement; *Judson v. Etheridge*, 1 C. & M., 743; though it is otherwise with an innkeeper. *Johnson v. Hill*, 3 Stark., 172.

The general right of detaining a thing until the money due for the work done upon it be paid, may be waived by a special agreement as to the time or mode of payment, but not merely by an agreement for the payment of a fixed sum, although a contrary doctrine is laid down in several cases. The principle appears to be this—that a special agreement does not of itself destroy the right to detain; but if it contain some term inconsistent with that right, it will. *Selwyn's Nisi Prius*, 10th edit., p. 1376.

Where a party is obliged to receive goods, he is also entitled to retain them for his indemnity. Thus common carriers, who are obliged to carry goods, and innkeepers to

receive guests, have a particular lien on the goods intrusted to their care. But an innkeeper cannot detain the person, or take off the clothes of his guest, in order to secure payment of his bill. *Sunbolf v. Alford*, 3 M. & W., 248.

The vendor of goods, not sold upon credit, has a lien for the price. And where the purchaser of goods, upon which the seller has a lien, obtains possession of them by fraud, the seller has still a right to the possession, and may maintain an action for them. *Hause v. Crowe*, R. & M., 414.

If by the agreement the purchaser of goods is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain till payment, and the seller will have no lien for the price; *Crawshaw v. Homfray*, 4 B. & A., 52. Where wharfage due upon goods is by the course of trade payable at Christmas, whether the goods are in the meantime removed or not, there arises no lien on the goods for the wharfage. *Id.*

There cannot be any lien unless the party claiming it has possession of the goods; *Selwyn's Nisi Prius*, 10th edit., p. 1372. And where a party obtains the possession of goods by misrepresentation, he cannot claim a lien upon them, though, had they come rightfully to his hands, he might have been entitled to retain them. *Madden v. Kempster*, 1 Camp., 12; *Lempriere v. Pasley*, 2 T. R., 485.

In order to establish a lien, it must appear that the work, &c., in respect of which it is claimed, was done at the request of the owner of the goods detained; and therefore, where a servant took his master's chaise, which had been broken by his negligence, to a coach-maker to be repaired without his master's knowledge, it was ruled that the coach-maker had no right to retain the chaise against the master for the repairs. *Hiscox v. Greenwood*, 4 Esp., 174; see *Roscoe*, 6th edit., p. 518-19.

General lien.—To establish a general lien by evidence of general usage, the instances ought to be ancient, numerous, and important; *Rushford v. Hadfield*, 6 East, 526. Dyers, factors, and wharfingers, have liens for their general balance; but not a fuller, or a public warehouse-keeper in London. A calico printer has a lien upon the linen in his possession, for the general balance of his account for work done in the course of that business. So a printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered, for his general balance due for printing the whole of the numbers. *Selwyn's Nisi Prius*, 10th edit., p. 1374.

Where a number of tradesmen come to an agreement not

to receive the goods of any person who will not consent that the goods shall be retained for a general balance, and a party having notice of such agreement sends his goods, he will be bound by it; *Kirkman v. Shawcross*, 6 *T. R.*, 14. So, if a carrier gives notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due to him from the respective owners, perhaps as between the real owner of the goods and the carrier, that may be a binding bargain; *per Bayley, J., Wright v. Snell*, 5 *B. & Ald.*, 353. But in such case he has not, as against the real owner, any lien for the balance due to him from the party to whom the goods are addressed, the mere factor of the owner; *Ibid.* A usage for carriers to retain goods as a lien for a general balance of accounts between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*; *Oppenheim v. Russell*, 3 *B. & P.*, 42. So also a carrier who by the usage of a particular trade, is to be paid for the carriage of goods by the assignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor; *Butler v. Woolcott*, 2 *New Rep.* 64; *Roscoe*, 6th edit., p. 517. A banker has a lien for his general balance upon the securities of his customers in his hands; *Davis v. Bowsher*, 5 *T. R.*, 488. Attornies have a lien for their general balance on papers of their clients which come to their hands in the course of their business; *Stevenson v. Blakelock*, 1 *M. & Sel.*, 535. But a certificated conveyancer is not entitled to a lien upon deeds in respect of which he has done business. *Steadman v. Hochley*, 15 *L. J., Ex.*, 332.

The stat. 5 & 6 Vict., c. 39, sec. 1, enacts that "any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made to any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement was made, is only an agent."

An agent who obtains money from another for the purpose of paying a bill of exchange, upon which they are

both liable, and deposits the goods of his principal as a security for the amount, is not within the Act. *Learoyd v. Robinson*, 13 L. J., Ex., 213.

Evidence in reply to defence of lien.—The plaintiff in answer to the defence of lien, may shew that he tendered the amount due to the defendant (*see as to Tender in general, ante*, p. 65), or that the defendant has waived the lien.

It is no answer to a special lien that the plaintiff has a set-off to a larger amount against the defendant, unless there is an agreement to deduct one debt from the other. *Pinnock v. Harrison*, 3 M. & W., 532.

How lien waived.—A party entitled to a lien may waive it, by not insisting upon it when the goods are demanded from him; as when, instead of relying on a lien, he claims them as his own; *Boardman v. Sill*, 1 Camp., 410 (n); or claims to hold them as a lien for a debt due from a third party; *Dicks v. Richards*, 4 M. & G., 574; *Cannee v. Spanion*, 14 L. J., C. P., 23; or where the defendant, having a lien for freight, refused to deliver the goods on the ground that he had signed a bill of lading for delivery to a third person; *Thompson v. Trail*, 6 B. & C., 36; or where the defendant, having a particular lien, claims to hold for an old balance; in which case an actual tender of the money covered by the particular lien is not necessary; *Jones v. Tarleton*, 9 M. & W., 675; *see Scarfe v. Morgan*, 4 M. & W., 270. So he may waive it by parting with the possession; as where the goods are taken in execution at his own suit; *Jacobs v. Latour*, 5 Bing., 130. Where a coachmaker repairs a carriage, and allows the owner to take it away, he cannot retain it for the past repairs when again brought to him; *Harkey v. Hitchcock*, 1 Stark., 408; and *see Jones v. Pearle*, 1 Stra., 557. And where the party entitled to a lien wrongfully parts with the goods, the owner may recover them from the holder without tendering what is due on the lien; for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods; *Scott v. Newington*, 1 M. & Rob., 252; *Jones v. Cliff*, 1 C. & M., 540; 3 Tyrwh., 576, S. C. Where a bailee of goods, who had a lien, delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu*, and got possession of them again, it was held that the lien did not revive; *Sweet v. Pym*, 1 East, 4. But where horses, on which a livery-stable keeper had by agreement a lien, were fraudulently taken out of his possession by the owner, it was ruled that the stable-keeper having without force retaken the horses, his lien revived; *Wallace*

v. Woodgate, R. & M., 193. Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived; *Horncastle v. Farran*, 3 B. & A., 497; *Stevenson v. Blakelock*, 1 M. & S., 535. Where the seller of goods recovered a verdict for goods bargained and sold, it was ruled by Lord Ellenborough, that he had not thereby waived his lien, though it might have been otherwise had he recovered a verdict for goods sold and delivered; *Houlditch v. Desanges*, 2 Stark., 337. A lien is not destroyed, though the demand in respect of which it arises is barred by the Statute of Limitations. *Spears v. Hartly*, 3 Esp., 81; *Roscoe*, 6th edit., p. 520.

Stoppage in transitu.]—In this action it frequently happens that the defence arises out of the right of a vendor of goods to stop them *in transitu* upon the insolvency of the vendee.

In general every unpaid vendor of goods has a right, on the insolvency of the vendor, to stop the goods if still on their way to the vendee. *Roscoe*, 6th edit., p. 521.

Statute of Limitations.]—The action must be commenced within six years next after the cause of action. 21 J. I., c. 16, s. 3.

The time of limitation does not begin to run until after the conversion.

Where the possession was originally legal, the statute runs from the demand and refusal. *Topham v. Braddick*, 1 Taunt., 577. See in general, *ante*, p. 77.

Judgment recovered.]—The obtaining of judgment and satisfaction for its full value, in an action for the conversion of a chattel, vests in the defendant in that action the title to the chattel retrospectively, and is a bar to any action in respect of a subsequent disposition of it by him. *Cooper v. Shepherd*, 15 L. J., C. P., 237.

ACTIONS FOR INJURING PERSONAL PROPERTY.

WILFUL OR INTENTIONAL INJURIES.

The action of trespass lies, not merely for taking personal chattels out of the possession of the owner, but also for any forcible injury which may be done to them whilst they are in his possession, or in the possession of any person for him. Chasing the cattle of another person, is also a trespass for which an action will lie, unless the defendant be justified

in doing so, for the purpose of removing them from his close where they were trespassing, or the like. And if he chase them, by setting his dog at them, this is the same as if he chased them himself; *King v. Rose, Freem.*, 347; but if the dog chase them in the absence of the master, the master is not answerable under this head as for a wilful or intentional injury; but if he knew the propensity of the animal, the plaintiff must be framed for the *negligence* in allowing the dog to be loose. *See post, Injuries arising from negligence.*

Trespass will lie for taking or killing a man's dog; for as a dog is a tame animal, there may be a property in him, as well as in any other tame animal. Even if a dog be found pursuing a hare, &c., upon the land of another, no person is justified in shooting him; *Vere v. Lord Cawdor*, 11 *East*, 568. But for taking or killing a beast or bird which is *feræ naturæ*, no action of trespass will lie, unless it were reclaimed. And therefore, if A make coney-burrows in his ground, and the coneys bred there go into the adjoining land of B, and he kill them, A cannot maintain trespass against B for having done so. *Boulston's Case*, 5 *Co.*, 104; *Cro. Car.*, 554.

If a man drive a carriage against the carriage of another, and thereby do damage to the carriage, horses, or person of the other, the latter may maintain an action of trespass against him. So if the owner or captain of a ship at sea run it against another, so as to sink or injure it, the owner of the latter vessel may maintain trespass against him. These cases, however, seldom arise from any wilful design or intention to injure, but from carelessness or want of skill, and therefore will be better considered under the head of *Injuries arising from negligence*, &c., *post.*, p. 271. In the superior courts, however, the action of *trespass* may be brought in such cases, whether the injury is intentional or not, provided it is brought against the party who actually caused the injury.

It is to be observed, that if the injury appear to have been the immediate effect of any wilful act of the servant, no action whatever can be maintained against the master; *Savignac v. Roome*, 6 *T. R.*, 125; even although he were present, provided it were done without his privity, and not by his orders. *Boucher v. Noidstrom*, 1 *Taunt.*, 568; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 489-90.

Where the plaintiff complains of intentional injuries committed to his property while in the hands of the defendant, he may in general frame his plaint for 'trespass,' but the nature of the injury, and the plaintiff's interest in the property, may be of such a nature as not to entitle him to

bring an action of trespass; in which case the term ought not to be employed. *See Hurrell v. Ellis*, 15 L. J., C. P., 18.

The plaintiff must prove his possession of or interest in the property injured; and that the injury or trespass was committed by the defendant, or by his orders, or at his instigation.

As to the evidence on these points, *see ante*, p. 250, the evidence in actions *for taking property*.

ACTIONS FOR INJURIES TO PERSONAL PROPERTY ARISING FROM NEGLIGENCE, CARELESSNESS, AND WANT OF SKILL.

§ 1. *Negligent Driving.*

§ 2. *Dangerous Animals.*

§ 3. *By Bailees in general.*

§ 4. *By Carriers.*

§ 5. *By Innkeepers.*

The cases in which an action may be maintained for injuries to personal property arising from negligence, carelessness, or want of skill, are very numerous. The most frequent injuries of this kind for which actions are brought, arise out of alleged want of skill or carelessness in the performance of some duty, as want of skill or carelessness in a driver of a carriage; or negligence by bailees and persons intrusted with property, as carriers, innkeepers, &c.

EVIDENCE IN ACTIONS FOR NEGLIGENCE DRIVING, &c.

If from carelessness, negligence, or want of skill in the driver, a carriage be driven against another and injure it, or do injury to any other property, or the person of another, an action will lie either against the driver, or against the owner, whether the owner himself were driving at the time; *Rogers v. Imbleton*, 2 New Rep., 117; *Moreton v. Harden*, 4 B. & C., 223; *Williams v. Holland*, 10 Bing., 112; or the master were present, but the servant driving, *Chandler v. Broughton*, 1 Cr. & M., 29; or the owner were absent altogether. And the same where the carriage is merely borrowed for the occasion; the borrower is answerable as owner, for the time. *Wheatley v. Patrick*, 2 M. & W., 650; *Archbold's Nisi Prius*, vol. i. 2nd edit., p. 576.

The plaintiff must prove the injury, and his property or interest in the thing injured; and that the injury was done by the carelessness, negligence, or want of skill of the driver; and (if the action is not brought against the driver) the liability of the defendant; and lastly, the amount of damage.

The plaintiff's interest.]—The action may in all cases be brought by the party injured; or if the property be injured whilst in the possession of a bailee, the action may be brought either by the bailor or bailee. Thus, if the carriage, &c., were at the time of the accident in the possession of the owner's servant, or of any person to whom he may have lent it gratuitously or for hire, the owner, or the person to whom it was lent, may maintain the action.

If the carriage injured be the carriage of the plaintiff, it is wholly immaterial who was in it at the time. *Howard v. Poote*, 2 Chit., 315.

That the injury was done by the carelessness, &c., of the driver.]—If the plaintiff, by the conduct of himself or servant at the time, conducted to the injury, or if by the exercise of ordinary care he might have avoided the consequence of the defendant's negligence, he cannot maintain the action. But mere negligence in other respects will not affect his right to recover; and therefore, where the defendant negligently drove against and killed the plaintiff's ass, which was in the highway, fettered in the fore feet, the plaintiff himself not being present, it was holden that the defendant was liable in damages, though the ass was wrongfully there, and prevented by the plaintiff's own act from escaping the damage. *Davies v. Mann*, 10 M. & W., 546.

The rule with regard to keeping the road seems to be, that if a carriage coming in any direction, leaves sufficient room for any other carriage, horse, or passenger, on its side of the way, it is sufficient; *Wordsworth v. Willan*, 5 Esp., 273; and in *Wayde v. Lady Carr*, 2 W. & R., 256, the Court said that, whatever might be law of the road, it was not to be considered as inflexible, since in crowded streets, situations and circumstances might frequently arise where a deviation from what is called the law of road would not only be justifiable but absolutely necessary.

Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed, Lord Kenyon held that it was putting himself voluntarily into danger, and that the injury was of his own seeking;

but the jury found a verdict for the plaintiff, which the Court of King's Bench refused to disturb. *Cruden v. Fentham*, 2 *Esp.*, 685. And although a person is not bound to confine himself to the ordinary side of the road, yet if he does not, he is bound to use a greater degree of care to avoid accidents than if he kept the proper side. *Pluckwell v. Wilson*, 5 *C. & P.*, 375; *Roscoe*, 6th edit., p. 354.

Defendant's liability.]—The party whose want of skill or carelessness in driving caused the accident, is of course liable for it; *Stephens v. Elwall*, 4 *M. & Sel.*, 259; but it very often happens that he is a mere servant, who is unable to make compensation for the injury, and the plaintiff naturally calls upon his master or employer, who is in law and justice answerable for employing a person whose want of skill or improper conduct endangers the property of others. In such cases the plaintiff has to prove such a connexion between the driver and the defendant as will render the latter liable.

In all cases where an injury is done by a servant driving, an action will lie against the master, *Morley v. Gaisford*, 2 *H. Bl.*, 442; whether the servant were hired by the job or by time, *Martin v. Temperley*, 4 *Q. B.*, 298; unless the injury appear to have been the immediate effect of any wilful act of the servant acting upon his own impulse, in which case no action will lie against the master. *Savignac v. Roome*, 6 *T. R.*, 125.

It has been already stated that it is immaterial whether the master were present but the servant driving, or the owner were absent altogether, and that where the carriage is merely borrowed for the occasion, the borrower is answerable as the owner for the time. *Supra*.

But if the owner of a carriage hire job horses, and the coachman is also provided by the job-master, if an accident happen through the negligence of the coachman, the owner of the carriage is not liable for it, but the action should be brought against the job-master. *Quarman v. Burnett*, 6 *M. & W.*, 499; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 577.

Where the master or owner is liable, the action may be brought against him alone, or against him and the servant jointly.

Where there were several proprietors of a coach, one of whom was driving at the time of the accident, and the action was brought against all, it was held that the action was rightly brought; the plaintiff could maintain trespass against the owner alone who was driving; but he could

maintain an action on the case against all the owners of the coach, jointly. *Morton v. Hardem*, 4 B. & C., 223.

Damage.]—The plaintiff should call some person competent to give an opinion as to the amount of damage, or if the carriage, &c., has been repaired, the amount paid or charged for it by the coachmaker, who may be called to prove the repairs, or the plaintiff may produce the bill or receipt.

ACTIONS FOR INJURIES TO PROPERTY BY DANGEROUS ANIMALS.

If a man keep a vicious animal, and knowing the animal to be so, he do not take sufficient measures to prevent its doing mischief, he will be answerable for any injury it may commit to the property or person of another. The necessary evidence in actions for such injuries to the *person* is stated, *ante*, p. 249, and the evidence for injuries to *property*, as cattle, sheep, &c., arising from the same cause, will, except as to the nature of the injury, be precisely the same.

NEGLIGENCE BY BAILEES IN GENERAL*.

A person with whom goods are deposited, to be *kept* by him without reward, is only liable for gross neglect, unless he spontaneously and officiously propose to keep the goods, and then he is only bound to take the same care of the goods as he would of his own, and therefore, if, notwithstanding such care, they are stolen by his servants, he is not liable.

So a person who undertakes without recompence to *carry* or do some act about the thing delivered to him, is only liable for gross negligence. A stage coachman is not liable for the loss of a parcel he was to carry without reward, unless he be guilty of great or extraordinary carelessness in regard to the goods. Where a party gratuitously undertakes the performance of a certain work for another, no action lies for omitting to do it, the engagement being void; but if the party undertaking enter upon or commence the work, he is at least liable if he injure the promisee by his gross neglect or wrongful act; and if his situation or pro-

* In general an action of *contract* may be maintained against a carrier, innkeeper, or other bailee, for negligence, as being a breach of his implied contract, and therefore the plaint may be so framed; but the subject naturally falls under the rights and remedies considered in this part of the work.

fession be such as to imply skill, an omission of that skill is imputable to him as gross negligence.

When goods are lent or bailed without pay, to be used for a certain time by the bailee, and the lender does not participate in any benefit derived by the bailee from the use of the goods bailed, the latter must take the utmost care of them, and is liable for slight neglect, and he must not on any account deviate from the conditions of the loan; therefore the loan of a horse to the defendant to ride, was held not to warrant him in allowing his servants to do so; but if there be a reciprocal advantage, the bailee is liable only for ordinary neglect; and is responsible only for gross carelessness, if the goods be lent for the sole benefit of the lender.

Where goods are delivered by a debtor to his creditor in pledge, or as a security for a debt, the creditor or pawnee is answerable for ordinary neglect; therefore he is liable if the things are stolen; unless he can shew that he used due care to protect it from such depredations; but he is not liable if forcibly robbed. And it seems a pawnbroker is not responsible if the goods pawned be destroyed by fire without his negligence or default. If the creditor tender the debt to the pawnee, and he refuses to deliver up the pledge, it seems he is liable, though it be subsequently lost, or even forcibly taken from him. A pawnee has it seems a right to sell the pawn after the pawner has made default in payment of the debt for which the pawn is given, though the mere giving a lien does not convey any right to sell. But he cannot use the goods pawned with him; although the law would probably imply the consent of the pawner to the pawnee to use the article pledged, where it could not be the worse for usage; *Jones on Bailments*, 80. The statute 39 & 40 Geo. III., c. 99, regulates the business, rights, duties, and liabilities of pawnbrokers.

No more than ordinary care is required of a bailee, with whom, for pecuniary or other reward, goods are bailed, that work, &c., may be performed thereon or with respect thereto. But a workman for hire is bound to exert himself in order to protect the thing bailed from any unexpected danger to which it may be exposed. And a chronometer maker entrusted with a chronometer to repair, who suffered his servant to sleep in the room where it was left, who stole it, but depositing his own watches in a more secure place, was held liable for the value. *Clarke v. Earnshaw, Gow*, 30.

The common law duty of a bailee, with whom cattle are left to be fed and taken care of for reward, is merely to take

ordinary care of them. If he leave the gates of his fields open, and the cattle stray out and are stolen, he must make good the loss. *Broadwater v. Bolt, Holt*, 541.

A domestic servant is, generally speaking, liable only in cases of gross neglect. *Jones on Bailments; Chitty on Contracts*.

NEGLIGENCE BY CARRIERS.

In an action against a common carrier for the loss of goods, the plaintiff must prove the delivery of the goods to be carried, and their non-arrival at their destination.

It is to be remarked that the consignee, or person to whom the goods were forwarded, is in general the person who is to bring the action; for the delivery to the carrier impliedly vests the property in the goods in the purchaser; if, however, by the terms of agreement between the consignor and consignee, the latter was not to acquire a property in the goods, and they were not to be at his risk until they actually were delivered to and accepted by him, in such case the consignor may bring the action.

A common carrier is one who for hire undertakes the carriage of goods for any person, either by land or water; and he is liable at common law for the loss of or injury to the goods, unless occasioned by an act of God or of the king's enemies. He is therefore liable although the goods are stolen, or were wrongfully seized by third persons; but he is not liable in the case of accidental fire. His duty to carry safely is independent of any express contract, and no such contract need be proved in an action for negligence founded on the custom. Railway companies are within the rule; *Palmer v. Grand Junction Railway Company*, 4 *M. & W.*, 749. But a cab driver is not a carrier at common law bound to carry 'safely and securely at all events,' but is liable if he do not take proper care of luggage entrusted to his care. *See Ross v. Hill*, 15 *L. J., C. P.*, 182.

The statute 11 Geo. IV. and 1 Wm. IV., c. 68, enacts that "no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following, that is to say, gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign

stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other articles, furs or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person sending or delivering the same, and such increased charge as is hereinafter mentioned, or an engagement to pay the same be accepted by the same receiving such parcel or package."

The second section enacts "that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

By the third section it is enacted, "that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such

receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

The fourth section provides "that no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them;" but that they shall "be liable as at the common law to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto or in anywise limiting such liability notwithstanding."

Section five enacts, "that for the purposes of this Act every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor, or stage coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier."

The sixth section provides "that nothing in this Act contained shall extend, or be construed to annul, or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes."

By the seventh section it is enacted, "that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid in addition to the value of such parcel or package."

The eighth section provides, "that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or

their employ, nor to protect any such coachman, guard, book-keeper, or other servant, from liability for any loss or injury occasioned by his own personal neglect or misconduct."

By the ninth section it is enacted, "that such mail contractors, stage coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value together with the increased charges as before mentioned."

In order to render the carrier liable even at common law, it must appear that the goods were duly delivered to him, or to some one intrusted by him to receive them. If, however, the carrier receive goods, he cannot set up as a defence, if the goods be subsequently lost, that they were not properly secured when delivered to him, the loss not arising from that cause. *Stuart v. Crawley*, 2 Stark. R., 323.

If any fraud or deceit be practised on the carrier; as if the real value of goods be deceitfully misrepresented to or fraudulently concealed from him, whereby he is induced to regard them as of trifling value, he is not liable, even at common law, in case they be lost or stolen from him. But it appears that *by common law* (i. e. cases not within the foregoing statute) there is no necessity to state the value of a parcel, if not asked, and there be no fraud; particularly if the non-communication did not occasion the loss, and it happened from the carrier wrongfully chusing another conveyance than that agreed upon.

In cases within the above statute, the plaintiff must in general prove express notice to the carrier of the value and nature of the article; but it seems doubtful whether in cases of *gross negligence* the carrier is not liable, although the goods are within the statute, and the plaintiff has not complied with its provisions. See *Boys v. Pink*, 8 C. & P., 361.

An inn where a book is kept for booking parcels by coaches stopping there, is a receiving house within the 5th section of the above Act, although the innkeeper sends the parcel by which coach he pleases. *Syms v. Chaplin*, 5 A. & E., 634.

Where the damage complained of happens distinctly from

the owner's neglect, and not from the neglect of the carrier, in the ordinary course of his duty, he is not liable. And where the plaintiff received a parcel from G to book for London, at the office of the defendants, common carriers; and instead of obeying his instructions, put the parcel into his bag, intending to take it to London, himself, by the coach as part of his own luggage; it was held that the plaintiff could not recover against them for the loss of the parcel; *Miles v. Cattle*, 6 *Bing.*, 743. Nor is a carrier responsible for the loss of a parcel, which, by agreement between the owner and the owner's servant, the latter was to carry for his own private gain; *Butler v. Baring*, 2 *C. & P.*, 613. And if goods be delivered to A, under a contract that the owner should go with them and take care of them, this is not a delivery of the goods to A as a common carrier. *Brind v. Dale*, 2 *M. & W.*, 775.

The responsibility of the carrier, as such, ceases when the goods have reached their place of destination, and the control of the carrier over them, in the character of a carrier, has terminated. Therefore, where a carrier, having conveyed the goods to the place where another carrier was to take them up, deposited them in his own warehouse for the convenience of the owner of the goods, the latter carrier not having arrived; it was held that the former was not liable for a loss occasioned by the destruction of goods by fire whilst in the warehouse. *Garside v. Trent and Mersey Navigation*, 4 *T. R.*, 581; *Hyde v. Same*, 5 *Id.*, 398; see *Galliffe v. Bourne*, 4 *Bing. N. C.*, 314.

There has been a difference of opinion on the general question, whether a carrier is bound to make an actual delivery at the residence of the consignee; but if a carrier be not bound to deliver goods at the consignee's premises, it seems that he should, at all events, give him notice of their arrival. And a carrier is clearly liable where he receives a reward for carrying the goods from the wharf at which he unloads to the plaintiff's residence; or where he has always been accustomed to take them home, and has himself kept a porter for that purpose; but not where the custom has been otherwise. *Chitty on Contracts*, 3rd edit., p. 484, and cases there cited.

NEGLIGENCE BY INNKEEPERS.

To charge an innkeeper on the custom or common law of the realm for the loss of the goods of travellers, who are his guests, it is necessary—1st. That the inn be a common inn; 2dly. The party ought to be a traveller or passenger; 3dly.

The goods and chattels must be in the inn, or placed elsewhere by the landlord or his servants; 4thly. There must be a default, expressed or implied, on the part of the innkeeper, and such default must be imputed to him, where the loss or injury cannot be ascribed to any other known cause; and 5thly. The article stolen must be a moveable chattel. *Chitty on Contracts*, 3rd edit., p. 477, and cases there cited.

If the goods or money be damaged or stolen whilst in the inn, either by the servants of the innkeeper or strangers, the innkeeper is liable; but if they are stolen by the guest's own servant or companion, or from his own hands, or entirely through his own gross negligence, or from a room in the inn which he used as a warehouse, or for the purposes of trade, and of which he had the exclusive possession, otherwise than as a mere guest, the innkeeper is not liable; *Ibid.*; but the mere request of the guest to have his goods placed in a particular room of the inn will not absolve the innkeeper; see *Richmond v. Smith*, 8 B. & C., 9. If an innkeeper receive goods, not in his character as such, but as a bailee, his liability as an innkeeper does not attach. And an innkeeper is not liable for injury received by a horse put up at his inn, unless there is direct proof of negligence on the part of himself or his servants. *Dawson v. Cholmeley*, 13 L. J., Q. B., 33.

PART III.

ACTIONS OF REPLEVIN; PROCEEDINGS TO RECOVER POSSESSION OF SMALL TENEMENTS; AND INTERPLEADER CLAIMS.

ACTIONS FOR REPLEVIN.

The County Courts Act, 9 & 10 Vict., c. 95, sec. 119, enacts "that all actions for replevin in cases of distress for rent in arrear *damage feasant* which shall be brought in the County Court, shall be brought without writ in a Court held under this Act."

In every such action of replevin, the plaint shall be entered in the Court for the district wherein the distress was taken; *Sec. 120*. And on entering the plaint in replevin, the plaintiff must specify and describe, in a statement of particulars, the cattle or the several goods and chattels taken under the distress, and of the taking of which he complains. *Rule 25*.

Power is given to remove into the superior courts any action of replevin in which either party to such action shall declare to the Court in which the action is brought, that the title to any corporeal or incorporeal hereditaments, or to any toll, market, fair, or franchise is in question, or that the rent or damage in respect of which the distress shall have been taken, is more than the sum of twenty pounds. *Sec. 121*.

All actions of replevin in cases of distress for arrear of rent or *damage feasant* (not removed), are to be tried in a summary way, as other actions in the County Courts. *Rule 26*.

On the trial of the action in the County Court, the plaintiff (who is the party complaining of the taking or seizure of his goods) will merely have to prove, in the first instance, his possession of the goods and the taking of them by the defendant. As to the proof of possession, *see ante*, p. 251. In general, however, this will be admitted by the defendant, upon whom the onus lies of justifying the seizure.

As the damages recovered by the plaintiff are usually

confined to the expense of the replevin bond, no evidence will be necessary on this point, unless some special damage be alleged and proved. *Roscoe*, 6th edit., p. 458. 1

EVIDENCE FOR THE DEFENDANT.

The defendant must justify his seizure, under a distress for rent or for *damage feasant*.

DISTRESS FOR RENT.

The defendant must prove that the plaintiff was tenant to him or to the party under whose orders he justifies the taking; and that the rent was in arrear; and if he justifies as bailiff of the landlord, he must prove his authority to make the distress.

Proof of tenancy.—Proof that the plaintiff paid rent to the defendant for the premises in question will be good evidence of the holding; see *Rogers v. Pitcher*, 6 Taunt., 202. So the verbal statements of the plaintiff as to the terms of his tenancy are admissible for this purpose, although the tenancy was created by adopting the terms of a former demise in writing. *Howard v. Smith*, 3 M. & G., 254.

The defendant, however, must prove a demise at a fixed rent; and therefore, if he only shows an agreement for a lease, it is insufficient; *Dunk v. Hunter*, 5 B. & Ald., 322; *Hayward v. Haswell*, 6 A. & E., 265. But though the plaintiff enters upon the land under an agreement for a lease in which the amount of the rent is not stated, yet if he occupies and pays yearly rent, he becomes tenant from year to year at that rent; *Knight v. Bennett*, 3 Bing., 361. So if, entering upon such an agreement, he acknowledges half a year's rent to be due; *Cox v. Bent*, 5 Bing., 185; and see *Saunders v. Musgrave*, 6 B. & C., 524. But unless a person, entering under an agreement for a lease, pays the rent, or promises to pay a rent certain, or to settle a rent certain in account, no demise at a rent certain can be implied, so as to entitle the landlord to distrain; *Regnart v. Porter*, 7 Bing., 451. So a tenant holding over after notice to quit given by the landlord, but not paying rent, is not liable to a distress; the mere holding over not making him tenant upon the old terms; *Jenner v. Clegg*, per Parke and Bolland, B.B., 1 M. & Rob., 213; *Roscoe*, 6th edit., p. 445. A demise of a marl pit, paying yearly a certain sum per cubic yard for all marl gotten, and of a brick mine paying so much per thousand for all bricks made and burnt, is a

demise at a rent sufficiently certain to sustain a distress for it; *Daniel v. Gracie*, 13 L. J., Q. B., 309. So is a reservation of 2s. 6d. for every yard of hay sold off the premises to be recovered by distress, as for rent. *Pollett v. Forest*, 16 Id., Q. B., 424.

Rent in arrear.—Slight evidence will be sufficient to prove that the rent is in arrear. If the defendant prove the plaintiff to have been in possession for the time claimed, this is good presumptive evidence that the rent for the time is in arrear, until the contrary be proved by the plaintiff, upon whom the onus lies of proving payment; see *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 630. But as in the County Courts the defendant is a competent witness, there will seldom be any difficulty in shewing at least a *prima facie* case of rent in arrear.

The things distrained must be such as a landlord has a right to seize. The general rule is, that all things found on the premises are liable to the landlord for rent. All the cases of exemption are, when the thing is there for some particular purpose to which its being taken there is merely incidental, and come under two heads. First, articles which are delivered and received in the way of trade, for the purpose of having a temporary thing done to or performed upon them. Thus, a horse taken to a blacksmith to be shod is not there to enjoy the comfort of the shop, but to be shod, and his remaining therein for a time is necessary for that purpose. So cloth delivered to a tailor (who in former times never worked up his own materials) is not there delivered for the purpose of occupying the premises, but to be manufactured into a garment, and it remains in his shop incidentally and for that purpose. Secondly, articles which are delivered in the way of trade for the purpose of buying or selling. Horses and carriages standing at livery are not within either exemption, and may be distrained. *Parsons v. Gingell*, 16 L. J., C. P., 227.

Authority to distrain.—If the defendant justifies as bailiff of the landlord, he must prove his authority to make the distress.

A recognition of his act will be equivalent to a previous command. And the ratification may be after action; see *Whitehead v. Taylor*, 10 A. & E., 213. One joint-tenant or co-parcener, or co-heir in gavel-kind, has an authority in law, without proof of any express command to distrain, as bailiff of his co-tenant; *Leigh v. Shepherd*, 2 B. & B., 466; but it is not clear that he can do so in spite of the express dissent of his co-tenants; *S. C.*, and *Robinson v. Hofman*, 4 Bing., 565; *Roscoe*, 6th edit., p. 458.

As the defendant must shew a lawful distress, he must prove the notice to the plaintiff, which notice must be in writing. *See Wilson v. Nightingale*, 15 L. J., Q. B., 309.

EVIDENCE FOR THE PLAINTIFF IN REPLY.

Denial of defendant's title.]—The plaintiff cannot in general dispute his landlord's title. As to the exceptions to this rule, see *Action for Rent—Evidence for the Defendant*, ante, p. 174.

If the relation between the plaintiff and defendant should be within one of such exceptions, and the plaintiff intends to deny the defendant's title, he should get the writ removed into one of the superior courts; *vide ante*, p. 282. If the writ is not so removed, and the title is in question, it seems that the Judge of the County Court would have no power to try the action. *See 9 & 10 Vict.*, c. 95, s. 58.

No rent due.]—It will not be sufficient to shew that part of the rent has been satisfied; for the defendant will be entitled to a verdict if it appear that part of the rent is in arrear; *Cobb v. Bryan*, 3 B. & P., 348. The plaintiff may shew that he has paid the rent to a superior landlord under a threat of distress; for such payment is in law a payment to the immediate landlord so as to leave no rent in arrear; *Taylor v. Zamira*, 6 Taunt., 524; *Stubbs v. Parsons*, 3 B. & Ald., 519. The payment is not less compulsory because the ground-landlord has allowed the occupier time to pay; *Carter v. Carter*, 5 Bing., 406. So where a demand in respect of interest on a mortgage affecting the premises is paid with the defendant's assent, the plaintiff may avail himself of the payment. *Dyer v. Bowley*, 2 Bing., 94; and *see Pope v. Biggs*, 9 B. & C., 245; *Roscoe*, 6th edit., p. 457.

Tender of the rent due.]—As to proof of tender, *see ante*, p. 65.

The tender of rent due, to be an answer to the defendant's case, must appear to have been made before the cattle or goods were impounded. *Thomas v. Harris*, 1 M. & G., 695. Tender either to the landlord, or to his bailiff who makes the distress, is sufficient; *Smith v. Godwin*, 5 B. & Ad., 413. But a tender to a person deputed by the bailiff is bad. *Pimm v. Grevill*, 6 Esp., 95.

It is not necessary to pay the money into Court, as in the case of a tender in ordinary cases. *Bul. N. P.*, 60.

The onus of proving a subsequent demand, so as to avoid the effect of the tender, lies upon the defendant. *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 613. As to a subsequent demand in answer to a defence of tender, *see ante*, p. 71.

Eviction.]—The evidence in this case may be the same as in the action of rent, *ante*, p. 178.

DAMAGE FEASANT.

The defendant, to justify the seizure of the cattle for *damage feasant*, must shew such a trespass as will warrant the seizure.

The occupier of land may distrain the cattle of another, doing damage or trespassing upon it; that is to say, he may seize and impound them, and keep them impounded until satisfaction be made to him for the damage they have occasioned. A horse, however, cannot be distrained *damage feasant*, if there be a rider upon him; *Storey v. Robinson*, 6 *T. R.*, 138; but if he be merely led by a person, it should seem that he may. And the cattle must be actually trespassing at the time they are distrained; and therefore to support a distress *damage feasant*, it must appear that the party distraining had actually got into the *locus in quo*, before the cattle got out of it; *Clement v. Milner*, 3 *Esp.*, 95. And if the cattle trespassed through the default of the occupier of the land,—as if the occupier be bound to maintain the fences of his close, and the cattle of his neighbour enter the close owing to a defect in, or want of repair of, the fences,—the occupier cannot distrain them *damage feasant*, until after he has given notice to remove them; all he can do is, to turn them out. But if he give notice to the owner of the trespass, and require him to remove them, and the owner notwithstanding allows them to remain, the occupier of the land may then either distrain the cattle *damage feasant*, or bring an action of trespass against the owner for the damage.

The party who distrains, or by whose authority the distress is made, must be the occupier of the land. But where A demised to B the milk of twenty cows, which A was to provide, and to feed on certain closes belonging to him, and A covenanted that B might turn out a mare upon the closes, but that no other cattle should be fed there: it was holden that the separate herbage and feeding of these closes thereby vested in B, and that he might distrain any other cattle of A doing damage there; *Burt v. Moore*, 5 *T. R.*, 329. So, where A, being possessed of land in a common field, and having a right of common over the whole field, and B having also a right of common over the whole field, agreed, for their mutual advantage and convenience, not to exercise their right of commonage for a certain term of years, each party covenanting to that effect; and during the term the

cattle of B came upon the land of A: it was holden that A might distrain them *damage feasant*; *Whiteman v. King*, 2 *H. Bl.*, 4. A tenant holding over after the expiration of his term, cannot distrain his landlord's cattle, which are put upon the premises by way of taking possession; *Taunton v. Costac*, 7 *T. R.*, 431; see *Butcher v. Butcher*, 7 *B. & C.*, 399. Where there are two joint tenants, or tenants in common of land, neither can distrain the cattle of the other *damage feasant*, for coming upon it. And where A had the right of digging for and taking stones under a close, and B had the right to the herbage, and B's cattle came upon that part of the close occupied by the works of A, and did damage; it was holden, that whatever remedy A had by action, he clearly had none by distress *damage feasant*. *Churchill v. Evans*, 1 *Taunt.*, 529; *Archbold's Nisi Prius*, vol. i., 2nd edit., p. 620.

EVIDENCE FOR THE PLAINTIFF IN REPLY.

In answer to the allegation of the defendant that the cattle were trespassing, the plaintiff may shew that the cattle escaped through the defect of fences which the defendant was bound to keep in repair, and that the plaintiff had no notice of their escape; see *ante*, p. 286. If the defendant denies the fact of the fences being out of repair, or the want of notice, this raises a question which can be tried in the County Court; but if the defendant denies his liability to repair, this may involve a question of title to land; and if it does, it cannot be tried in the County Court.

So if the plaintiff disputes the defendant's title to the land in which the cattle were seized, or claims a right of common over it, a question of title is raised, and the action should be removed into one of the superior courts. See *ante*, p. 282.

Tender of amends.—The plaintiff acknowledging the right of the defendant to distrain, may shew in answer a tender of amends. See *ante*, p. 285, *Tender of rent in replevin for distress for rent*.

PROCEEDINGS TO RECOVER POSSESSION OF SMALL TENEMENTS.

The 9 & 10 Vict., c. 95, sec. 122, enacts, "That when and as soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of fifty pounds by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or, if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the County Court to be holden under this Act, and thereupon a summons shall issue to the person so neglecting or refusing; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show cause to the contrary, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to the Court proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of the service of the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the judge to issue a warrant under the seal of the Court to any bailiff of the Court, requiring and authorizing him, within a period to be therein named, not less than seven or more than ten clear days from the date of such warrant, to give possession of the premises to such landlord or agent; and such warrant shall be a sufficient warrant to the said bailiff to enter upon the premises, with such assistants as he shall deem necessary, and to give possession accordingly; provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon; provided also, that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from

any action which may be brought against him by any such tenant or occupier for or in respect of such entry and taking possession where such person had not, at the time of suing out of the same as aforesaid, lawful right to the possession of the same premises."

EVIDENCE FOR THE PLAINTIFF, OR APPLICANT.

The landlord or his agent must give to the Court "proof of the holding, and of the end or other determination of the tenancy, with the time and manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession." 9 & 10 Vict., c. 95, s. 122, *supra*.

In regard to the party taking out the summons, the term "landlord," means "the person entitled to the immediate reversion of the lands, or if the property be holden in joint tenancy, coparcenary, or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion," and "agent" means "any person usually employed by the landlord in the letting of lands, or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of such landlord." 9 & 10 Vict., c. 95, s. 142."

Proof of the holding.—Proof of the holding may be shewn by the production of a lease or agreement, with proof of the defendant's handwriting; or it may be shewn by evidence of the tenant having paid rent to the landlord, or submitted to a distress by him. *See ante*, p. 168, *Action for rent*.

Where the title of the landlord has accrued since the letting of the premises, and the tenant has not paid rent to the claimant, or otherwise acknowledged his title, the derivative title must be proved with as much strictness, as to its being legal evidence, as if it was given in an action of ejectment; there is nothing in the statute which dispenses with such strictness. *Archbold's County Court Prac.*, p. 83.

Proof of the end or other termination of the tenancy with the time and manner thereof.—The statute empowers these proceedings "when and so soon as the term and interest of the tenant of any house," &c., "shall have ended, or shall have been duly determined by a legal notice to quit." The determination of the tenancy by forfeiture, therefore, would not be within the statute*.

* See the decision of Mr. Herbert, J. C. C., in *Evans v. Walters*, C. C. Chron., p. 171.

Term ended..]—Where the term has expired by the mere lapse of time, the production and proof of the lease proving the holding will be evidence of that fact. Or if the taking was a verbal one for one year, or any fixed period less than three years, the same evidence which establishes the taking or holding, will generally be *primâ facie* proof of the expiration of the term.

Notice to quit..]—Where the tenancy has been determined by a legal notice to quit, strict proof must be given of the notice, and therefore it is of importance to state the law with respect to notices to quit, as regards the cases in which they may be given, by whom, and the form and manner of service. The question whether the tenancy has been “duly determined by a legal notice to quit,” is one upon which the decision of the County Court is conclusive upon the parties. *Ex parte Norrall*, 17 L. J., Q. B., 161.

When to be given..]—A notice to quit is required by law, or by local custom, or by express stipulation between the parties. In the latter case, the notice must be such as has been agreed upon, whether the same would be required by law, or be sufficient if no such stipulation existed; see *Doe v. Raffan*, 6 Esp., 4; *Doe v. Bell*, 5 T. R., 471; *Doe v. Dobell*, 1 Ad. & El., N. C., 806; *Berry v. Lindley*, 11 L. J., C. P., 27. And therefore, if it be agreed between the parties that the tenant shall quit at a quarter’s notice, of course a quarter’s notice only is necessary. Where it is required by local custom, the custom will be considered as engrafted upon and forming part of the contract between the parties, and must be complied with.

A tenancy from year to year, or from year to year so long as both parties please, is determinable by six months’ notice expiring at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use provisions shewing that they contemplated a tenancy for two years. And when a tenant holds over after the determination of a lease and pays rent, he is tenant from year to year. *Doe v. Smarridge*, 14 L. J., Q. B., 327.

A tenancy “from year to year from Michaelmas next, at the yearly sum of 55*l.*, payable half yearly at Lady Day and Michaelmas, except the last half year, which portion of the rent shall be paid on or before the 1st of August in that year; the tenant to allow the landlord or incoming tenant in the last year to enter on the 1st of May, to make fallows, &c., for which a compensation, &c., shall be allowed, &c., the tenant to be allowed the use of the barns, &c., for stocking and threshing the crops of the last year, till the

1st of May after the tenancy," is not a tenancy for more than a year, and a notice to quit may be given expiring at the end of the first year; *Doe v. Nainby*, 16 L. J., Q. B., 303.

If the tenancy be from half year to half year, half a year's notice to quit must be given: if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice; see *Doe v. Hagell*, 1 Esp., 94; *Doe v. Raffan*, 6 Esp., 4;—if there be an usage to that effect, *Huffell v. Armistead*, 7 Car. & P., 56; and there be no express stipulation to the contrary. See 6 East, 124 (n), per *Ld. Mansfield*. And six months' notice is requisite, although the rent is payable quarterly or at other shorter periods. *Spirley v. Newman*, 2 Esp., 266.

The time at which the tenant is required to quit must be the expiration of the year, or month, &c., of his tenancy. Even where a tenancy from year to year is created with an express stipulation that either party may determine it by a three months' notice to quit, it must be by a notice ending with the year of the tenancy. *Doe v. Green*, 9 A. & E., 658.

It appears to be immaterial whether the tenancy has been determined by notice from the landlord or the tenant.

By landlord.]—When given by the landlord, it must be given by him or by the person who may have succeeded him in title, as heir, assignee, &c., or by his agent; see *Doe v. Phillis*, 2 Chit., 170; *Roe v. Pearce*, 2 Camp., 96; *Doe v. Read*, 12 East, 57. If there be joint owners of the land, to enable them to proceed under this Act, the notice must be either signed by all, or given expressly on behalf of all; *Doe v. Hughes*, 7 M. & W., 139; and see *Alford v. Vickery*, Car. & M., 280; if given by an agent on behalf of all, it will determine the tenancy as to all, although he be authorized by one of them only, *Doe v. Hughes*, *supra*; and it is sufficient if his authority be subsequently recognized by them, *Goodtitle v. Woodward*, 3 B. & Ald., 689. But if a notice to quit be given by the agent of an agent, it is not sufficient, unless it be recognized by the principal; *Doe v. Robinson*, 3 Bing., N. C., 677. If the notice be given by a corporation, it will be sufficient if it be signed by their steward, without proving that he had authority under seal to do so; *Doe v. Pearce*, 2 Camp., 96. The authority may also in some cases be implied, from other acts which the agent is expressly authorized to do: as, for instance, where a receiver was appointed by the Court of Chancery, with a general authority to let the land to

tenants from year to year, it was holden that he had thereby also authority to determine such tenancies by a regular notice to quit. *See Doe v. Read*, 12 *East*, 57.

It appears that a notice to quit is not vitiated because parties who had nothing to do with it joined in giving it; *Doe v. Foster*, 15 *L. J.*, *C. P.*, 263. It must be given to the landlord's immediate tenant, or to his executor or other personal representative, or assignee, but not to an under tenant; *Pleasant v. Benson*, 14 *East*, 234. Where the premises are held by two tenants in common, a notice served upon one of them raises a presumption that the notice reached the other tenant in common, although he lived at a distance. *Doe v. Watkins*, 7 *East*, 551.

By tenant.]—If a notice to quit be given by the tenant, it should be given to his immediate landlord, or the person to whom he is bound to pay his rent, or to his landlord's agent; and not to any head landlord or person under whom his immediate landlord claims.

In other respects, the same rules apply to this notice as to a notice to quit by a landlord; but if the landlord adopts these proceedings on a notice given by the tenant, he of course waives any irregularity in it. If, however, a mistake be made in the notice as to the expiration of the year or month, &c., of the tenancy, it will not have the effect of determining the holding, and the tenant himself may take advantage of the defect; it is not good as a notice to quit, nor does it operate as a surrender, inasmuch as it is to take effect in future. *Doe v. Milward*, 3 *M. & W.*, 323; *see Bessel v. Landsberg*, 14 *L. J.*, *Q. B.*, 355.

Form and service.]—A notice to quit is usually in writing, and in prudence should be so; but a verbal notice to quit, given by a tenant holding under a verbal lease, is sufficient; *Timmins v. Rawlinson*, 3 *Bul.*, 1603; *Doe v. Crick*, 5 *Esp.*, 196; even though given on the part of a corporation; *Roe v. Pierce*, 2 *Camp.*, 96. No particular form is necessary; if it indicate to the tenant, with sufficient certainty, that he is to quit the premises at a certain period, it is sufficient. When the notice was, "I desire you to quit the possession at Lady Day next of, &c., or I shall insist upon double rent for the same," it was holden sufficient; although it was urged that the addition of the latter clause made it optional with the tenant to remain in possession upon payment of double rent; *Doe v. Jackson*, 1 *Doug.*, 175. It is usually directed to the tenant; but this is not necessary, if it be personally served upon him; *Doe v. Wrightman*, 4 *Esp.*, 5; and *see Doe v. Spiller*, 6 *Esp.*, 70. Care must be taken that the time at which it requires the tenant

to quit be the expiration of the year or month of his tenancy. *See ante*, p. 291.

A notice to quit at Michaelmas, is a good notice either for Old or New Michaelmas Day; for although, *primâ facie*, it would be deemed a notice to quit at New Michaelmas, yet if the holding is from Old Michaelmas, it is a sufficient notice for that time also; *per Parke, B., Doe v. Pessin*, 9 *Car. & P.*, 467. And where a notice, served at Michaelmas 1795, required the tenant to quit at Lady Day, "which will be in the year 1795," instead of 1796: the Court held that these latter words might be rejected, and that the notice was sufficient; *Doe v. Kightsley*, 7 *T. R.*, 63. But where a tenancy began on the 11th of October, a notice served in June 1840, requiring the tenant to quit on the 11th of October, "now next ensuing, or such other day or time as your said tenancy may expire," and it turned out that a six months' notice was necessary, it was held that this notice could not operate as a notice to quit in October, 1841; *Mills v. Goff*, 14 *L. J., Ex.*, 249; so a notice, dated 21st October, 1843, to quit on the 13th of May next ensuing, or on such other day "in the current year as the tenancy of the premises you now hold shall expire," is not sufficient; *Doe v. Morphett*, 14 *L. J., Q. B.*, 345; overruling *Doe v. Culliford*, 4 *D. & R.*, 248.

The notice, however, is sufficient, if it requires the tenant to quit at the end and expiration of the current year of his tenancy which shall expire next after the end of one half year from the date thereof; *Doe v. Smith*, 5 *A. & E.*, 350. Care must be taken also to describe the premises correctly; *Doe d. Cox v. —*, 4 *Esp.*, 185. But where they were described as of a wrong parish, the Court, after verdict, held it to be immaterial, as the defendant did not show that he held any other premises of the lessor of the plaintiff, or that he was misled by the notice; *Doe v. Wilkinson*, 12 *Ad. & El.*, 743. And the notice also must be as to the whole of the premises demised; a notice as to part only will be bad; *Doe v. Austin*, 14 *East*, 245. Where a house and land are let together from year to year, to be entered upon at different times, and it does not appear from the terms of the demise from what time the whole is to be taken as let together: it is a question of fact for the jury, if there be one, whether the house or the land be the principal subject of demise, or accessorial merely, in order that the judge may decide whether the notice to quit the whole were given in time; *Doe v. Howard*, 11 *East*, 498; and see *Doe v. Hughes*, 7 *M. & W.* 139; *Doe v. Rhodes et Al.*, 11 *Id.*, 600.

How proved.]—Duplicates are usually made of the notice, and are examined; they are then signed by the landlord, and one served, and the other kept. But if there be but one original notice signed, it will be sufficient; and it may be proved by a copy, without any notice having been given to produce the original; *Doe v. Somerton*, 14 *L. J.*, *Q. B.*, 210. The service is proved by the party who served the notice, the contents are proved by the copy or duplicate kept, and the evidence of the person who examined it with the notice served; and the signature of the landlord or his agent to it, is proved by some person who either saw him sign it, or who saw the notice before it was served; and can swear to the handwriting. If there were an attesting witness, however, to the copy served, the handwriting of the landlord or agent to it can only be proved by such attesting witness. *See ante*, p. 209.

Although the statute speaks of the proof to be given where the tenant does not appear and shew cause, the same evidence must be given if he does appear, unless he expressly waives or admits the facts.

Where the tenant does not appear, proof must be also given of the service of the summons, and that the tenant or occupier still neglects or refuses to deliver up the premises.

The County Court Act provides that such summons "may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person or persons so holding over as aforesaid; provided that if the person or persons so holding over, or any or either of them, cannot be found, and the place of abode of such person or persons shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting of the said summons on some conspicuous part of the premises so held over, shall be deemed to be good service upon such person or persons respectively." 9 & 10 *Vict.*, c. 95, *sec.* 123.

EVIDENCE FOR THE TENANT OR DEFENDANT.

Denial of landlord's title.]—If the tenant has come in under the plaintiff, or has acknowledged his title by the payment of rent to him, or otherwise, he will not be permitted to impeach it; *see ante*, p. 174. But if he did not come in under the landlord who takes the proceedings, and has not subsequently recognized his title, he may dispute the derivative title, which the landlord is bound to establish; and if there appears to be a substantial doubt as to the land-

lord's title, the Judge cannot proceed in the inquiry; at least if this is in an 'action' within the 9 & 10 *Vict.*, c. 95, s. 58; see *Tinniswood v. Pattison*, 15 *L. J.*, *C. P.*, 231; but the mere fact of the tenant appearing to such summons and shewing cause, is not sufficient to oust the Court of its jurisdiction to grant a warrant of possession; but it is for that Court to determine whether the cause shewn is sufficient or not. *Ex parte Norvall*, 17 *L. J.*, *Q. B.*, 161.

Waiver of notice to quit.—The tenant may shew that the landlord waived the notice to quit, by acceptance of rent after the expiration of the notice; *Doe v. Cordment*, 6 *T. R.*, 219; by a distress for rent accruing after the expiration of the notice; *Doe v. Willingale*, 1 *H. Bl.*, 311; by a recovery in an action for use and occupation for a period subsequent to the expiration of the notice; *Birch v. Wright*, 1 *T. R.*, 387; or by a subsequent notice; for that recognises a tenancy subsisting after the expiration of the former. *Doe v. Palmer*, 16 *East*, 53.

In the case of acceptance of rent after the expiration of the notice, the rent must be received as rent, and in actions in the superior courts this is a question for the jury; *Doe v. Cordment*, 6 *T. R.*, 219; *Doe v. Batten, Camp.*, 243. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker, without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, to be no waiver; *Doe v. Calvert*, 2 *Camp.*, 387.

Where a second notice was given after the expiration of the first, and after the commencement of an ejectment in which the landlord continued to proceed notwithstanding the second notice, it was held to be no waiver; for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out; *Doe v. Humphreys*, 2 *East*, 237. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you hold of me within fourteen days from this date, otherwise I shall require double value," it was ruled that the latter notice, having for its object only the recovery of the double value, did not operate as a waiver; *Doe v. Steel*, 3 *Camp.*, 115. Where a landlord gave his tenant notice to quit, but promised not to turn him out unless the premises were sold; and afterwards, and after the expiration of the notice to quit, the premises were sold, but the tenant refused to deliver up possession; it was held that

the promise was no waiver of the notice. *Doe v. Symmonds*, 10 *East*, 13.

The same rules apply also to the case of a term which has expired by the lapse of time. If the landlord has done anything to create a new subsisting tenancy, it will be an answer to the *prima facie* proof of the expiration of the first term.

Where no notice to quit was necessary, and a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the Court considered it a mere demand of possession, and not a recognition of a subsisting tenancy. *Doe v. Inglis*, 3 *Taunt.*, 54; *Roscoe*, 6th edit., p. 427.

By merely increasing the amount of rent payable by a tenant from year to year, a new tenancy is not necessarily created, so as to make it necessary that a notice to quit should correspond with the date of the commencement of such increased rent. *Doe v. Geekie*, 13 *L. J.*, *Q. B.*, 239.

Judgment recovered.]—Where after hearing the parties under the 122nd section, the Judge adjudicated for the landlord, but ordered the warrant not to issue until a given day, but the applicant, instead of proceeding upon that order or judgment, summoned the tenant afresh, and proved the same notice to quit, &c., as on the first summons, a rule for a prohibition was granted on the ground that after an adjudication the Judge of the County Court had no power to hear a case a second time, and after cause shewn against the rule, it was enlarged for further argument until next Michaelmas Term (1848). *Ex parte Norval*, *Bail Court*, *Trinity Term*, 1848; and see *Jones v. Jones*, 17 *L. J.*, *Q. B.*, 170.

INTERPLEADER CLAIMS.

The 9 & 10 Vict., c. 95, s. 118, enacts, "That if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this Act, or in respect of the proceeds or value thereof, by any landlord for rent or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the Court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons calling before the said Court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any

of Her Majesty's superior Courts of Record, or in local or inferior court, in respect of such claim, shall be stayed, and the Court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattles were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the County Court; and the Judge of the County Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such Court."

The claimant shall be deemed the plaintiff, and the execution creditor the defendant; and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the officer making the application, or leave at the office of the clerk of the Court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or in case of a claim for rent, of the amount thereof, and for what period the same is claimed to be due. *Rules of Practice for the County Courts*, 39*.

It will be perceived that two kinds of claims are contemplated by the statute. 1. A claim for rent by the landlord of the party whose goods are taken in execution; and 2. A claim to the goods themselves or some part, by some third person.

CLAIM BY LANDLORD FOR RENT.

The County Courts Statute enacts, "That so much of an Act passed in the eighth year of the reign of Queen Anne, intituled 'An Act for the better securing of Rents, and to prevent Frauds committed by Tenants,' as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Court holden under this Act; but the landlord of any tenement in which any such goods shall be so taken, shall be entitled, by any writing under his hand or under the hand of his agent to be delivered to the bailiff

* It has been ruled by Mr. Herbert, one of the Judges of the County Court, that the particular must shew how and by what means the title of the applicant to the goods arises, and that it is insufficient merely to state that the goods 'are the whole and sole property of the claimant. See *County Courts' Chronicle*, p. 123.

or officer making the levy, which writing shall state the terms of holding, and the rent payable for the same, to claim any rent in arrear then due to him, not exceeding the rent of four weeks where the tenement is let by the week, and not exceeding the rent accruing due in two terms of payment, where the tenement is let for any other term less than a year, and not exceeding in any case the rent accruing due in one year; and in case of any such claim being so made, the bailiff or officer making the levy shall distrain as well for the amount of the rent so claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution issued under this Act, and shall not proceed to sell the same or any part thereof within five days next after such distress taken; and if any replevin be made of the goods so taken, such of the goods shall be sold under the execution as shall satisfy the money and costs for which the warrant of execution issued, and the costs of the sale; and the overplus of such sale (if any), and also the residue of the goods, shall be returned as in other cases of distress for rent, and replevin thereof; and for every such additional distress for rent in arrear the high bailiff of the Court shall be entitled to have, as the costs of the distress, instead of the fees allowed by this Act for making such distress and keeping possession thereof, the fees allowed by an Act passed in the 57th year of the reign of King George the Third, intituled 'An Act to regulate the Costs of Distresses levied for Payment of small Rents.'"

A question has been raised, whether in the event of a claim by the landlord under this section, and the goods sold under the levy are not sufficient to satisfy him and the execution creditor, the landlord is entitled to precedence and to be satisfied in the first instance. *See County Courts' Chronicle*, p. 205*.

The landlord being the party who makes the claim, must establish it by proof of the tenancy and the arrears of rent. *See ante*, p. 168.

The defendant in the action (whose goods have been taken) may of course be called as a witness to prove or disprove the landlord's claim.

* Conflicting decisions have occurred in the County Courts on this point. *Mr. Carrow, Mr. Herbert, Mr. Trafford, and Mr. Furner, J.J. C.C.*, have held that the landlord is in such a case entitled to priority; *see County Courts' Chronicle*, pp. 105, 162, 190, 214. On the other hand *Mr. Ingham, and Mr. Hulton, J.J. C.C.* have ruled the contrary; *see Ibid.*, pp. 82, 198.

CLAIM TO THE GOODS BY THIRD PARTY.

The claim by a third party to goods taken in execution generally arises—1. Where goods, being found in the possession of the person against whom the execution issued, are taken by the officer of the Court, but are claimed by some other person by virtue of an assignment or other conveyance; or 2. Claims by assignees of bankrupts.

Claims under assignment, &c.—The statute 13 Eliz., c. 5 (made perpetual by 29 Eliz., c. 5), after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, judgments, and executions have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to enact that every feoffment, &c., of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, made for any intent and purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, &c., whose actions, suits, &c., are or might be in anywise disturbed, hindered, delayed, or defrauded, *utterly void*. By sect. 6, however, the Act is not to extend to any estate or interest in lands, &c., on good consideration and *bona fide*, lawfully conveyed to any person, &c., not having notice of such covin, &c.

When it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of this statute, a question arises proper for the consideration of a jury, who are to say whether the transaction was *bona fide*, or a contrivance to defraud creditors. Where a bill of sale of chattel property is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, continuance in possession by the donor is a sign of a trust for his benefit; and therefore, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the meantime the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as *executor de son tort* for the debts of the deceased; *Edwards v. Harben*, 2 T. R., 587; see *Shears v. Rogers*, 3 B. & Ad., 363. Indeed, in *Edwards v. Harben*, the Court went so far as to say, "This has been argued as a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance, *per se*, as makes the transac-

tion fraudulent in point of law. That is the point we have considered, and we are all of opinion that if there be *nothing but the absolute conveyance without the possession*, that, in point of law, is fraudulent." Lord Ellenborough thought that if the vendor remained in possession of the goods after the sale thereof, the case was not bettered by the vendee's remaining in possession along with him; and therefore, where an action was brought against the Sheriff of Middlesex for a false return to a writ of *feri facias* sued out by the plaintiff against John Mason, and returned by the Sheriff *nulla bona*, and upon the trial it appeared that Mason had, before the issuing of the *feri facias*, assigned all his effects to a creditor, whose servant was immediately put into the house, and remained conjointly with Mason, Lord Ellenborough directed a verdict for the plaintiff, saying, "To defeat the execution there must have been a *bona fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors." *Wordell v. Smith*, 1 Camp., 333.

However, though in *Edwards v. Harben* it was laid down, in the express terms above stated, that an absolute sale without delivery of possession was, in point of law, fraudulent, the tendency of the superior courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And indeed, it ought to be remarked, that even in *Edwards v. Harben*, the words of Buller J. were: "If there be *nothing* but an absolute conveyance, without possession, that in point of law is fraudulent;" by which his lordship may have intended, that where there was *nothing*, *i. e.*, no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong, that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said, that there is "*nothing but an absolute conveyance without possession*." Therefore, where the sheriff seized the goods of the Duke of Marlborough, and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession, but allowed them to remain in

the Duke's mansion and be used by him as before, it was held that it was properly left to the jury to say whether the sale was a *bona fide* sale for money paid by the plaintiff; and that, if so, they should find a verdict for him. Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety, and as the secrecy of the transfer is a badge of fraud, so is the notoriety of the transfer always a strong circumstance to rebut the presumption thereof. *Latimer v. Batson*, 4 B. & C., 625; *Leonard v. Baker*, 1 M. & Sel., 251; *Watkins v. Birch*, 4 Taunt., 823; *Joseph v. Ingram*, 8 Taunt., 833; *Kidd v. Rawlinson*, 2 B. & P., 59; *Cole v. Davies*, 1 Lord Raym., 724.

It may, therefore, be safely laid down, that, under almost any circumstances, the question, *fraud or no fraud*, is one for the consideration of the jury. See the judgments in *Martindale v. Booth*, 3 B. & Adol., 493, where several cases establishing this point are cited; and see in *Carr v. Burdiss*, 5 Tyrwh., 316; the expressions of Parke, B., *Dewey v. Bayntun*, 6 East, 257; *Reed v. Blades*, 5 Taunt., 212.

The above observations apply to cases where the conveyance is *absolute*, and there is no transmutation of possession, but where the conveyance is not absolute to take effect immediately, as, for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud. "We consulted," says Buller, J., in *Edwards v. Harben*, "with all the judges, who are unanimously of opinion, that unless possession accompanies and follows the deed, it is fraudulent and void. I lay stress on the words accompanies and follows, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his Lordship proceeds to point out the distinction between "deeds, or bills of sale which are to take place immediately, and those which are to take place at some future time; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed." See *B. N. P.*, 258, and *Cadogan v. Kennet, Camp.*, 436; *Minshull v. Lloyd*, 2 M. & W., 450. This doctrine was affirmed and acted upon in the case of *Martindale v. Booth*, 3 B. & Adol., 505, and in *Reed v. Wilmot*, 7 Bing., 577. Cases may, and probably will arise, in which it may

be attempted to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor, into deeds really intended not to operate as a *bona fide* transfer of property, but to endure for the vendee's protection. In such cases, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute, for the presence or absence of fraud depends on the motives of the party making the conveyance. See *per Le Blanc J.*, *Nunn v. Wilson*, 8 T. R., 521.

There are some cases, that for instance of the sale of a ship at sea, in which an actual delivery being impossible, no presumption of fraud can possibly arise from the substitution of one merely symbolical. *Atkinson v. Maling*, 2 T. R., 472.

It will be observed that the statute of Elizabeth only declares the fraudulent conveyance to be void "as against that person, his heirs, successors, executors, &c., who are or might be in anywise disturbed, hindered, delayed, or defrauded. Such a conveyance is good as against the party executing it; *Robinson v. McDonnell*, 2 B. & A., 134; and also as against any other person privy and consenting to it. *Steel v. Brown and Parry*, 1 Taunt., 381.

In *Twyne's case*, 3 Coke, 80, P was indebted to T in 400*l.*, and was also indebted to C in 200*l.*, C brought an action of debt against P, and pending it, P being possessed of goods and chattels of the value of 330*l.*, secretly made a general deed of gift of all his goods and chattels, real and personal whatsoever, to T, in satisfaction of his debt; notwithstanding which P continued in possession of the goods and some of them he sold; and shorn the sheep, and marked them with his own mark; and it was held that this gift was fraudulent within the statute of 13 Eliz.

In this case the debt to T would have been a sufficient consideration to support a *bona fide* transfer of the goods, and the ground on which the Court proceeded, was not that there was no sufficient consideration to sustain the grant by P to T, but that the secrecy, the non-delivery, &c., raised a presumption that the whole transaction was collusive and a juggle, and though purporting to be a sale, was in reality the creation of a trust for the benefit of P; to use the words of the Court, "it was resolved that notwithstanding here was a true debt due to T, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it was provided that the said Act shall not extend to any estate or interest in lands, &c.,

goods or chattels, made on good consideration and *bona fide*; for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide*, within the said proviso, which is accompanied with any trust." In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favoured claimant to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports; still the law will not allow a creditor to make use of his demand to shield his debtor; and, while he leaves him *in statu quo*, by forbearing to enforce the assignment, to defeat the other creditors by insisting upon it. Thus, (to illustrate this position by Lord Coke's words in the last case), "if a man be indebted to five several persons in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other person for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso, for the proviso saith on a good consideration *and bona fide*—so a good consideration doth not suffice if it be not also *bona fide*." There is, however, no doubt, but that a debtor (so he be not a trader in contemplation of bankruptcy) may openly prefer one creditor to the rest, and transfer property to him even after the others have commenced their actions; *Pickstock v. Lyster*, 3 *M. & Sel.*, 371; *Holbird v. Anderson*, 5 *T. R.*, 235; *Meux v. Howell*, 4 *East*, 1; *Eastwick v. Cailland*, 5 *T. R.*, 420; *Bowen v. Bramidge*, 6 *C. & P.*, 142; *Goss v. Neale*, 5 *B. M.*, 19. See, however, the case of *Owen v. Body*, 5 *A. & E.*, 22. An assignment of all his effects in trust for his wife, by a man about to be tried for felony has been held to come within this statute, and to be fraudulent and void as against the Crown; *Shaw v. Bean*, 1 *Stark.*, 319. A deed has been held void which purported to create a trust for all the creditors, but contained terms which would, if accepted, have imposed upon them the liability of partners. *Owen v. Body*, 5 *A. & E.*, 22.

It has been said by Lord Mansfield, that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by stat. 13 Eliz., c. 5."

The question whether a gift be fraudulent within the

meaning of the statute, is very different indeed from the question, whether, if made by a trader, it would be fraudulent, and an act of bankruptcy within the meaning of the Bankrupt Act. *Vide Smith's Leading Cases, 2nd edit., vol. i., pp. 9, 12.*

It is to be observed, that goods which the party against whom the execution issues has *deposited* with another person as security for a debt, cannot be seized. *Rogers v. Kennay, 15 L. J., Q. B., 381.*

Where under a bill of sale assigning "all and every the goods and furniture, &c., which there were, or which at any time during the continuance of the security, should be in, about, or belonging to the dwelling-house," &c., the assignor remained in possession for a year, it was held that the deed only passed such property as was on the premises at the time of its execution, and that it could not operate as an assignment of the goods thereafter to be brought upon the premises. *Gale v. Burnell, 14 L. J., Q. B., 340; Lunn v. Thornton, 14 Id., C. P., 161.* But a bill of sale of goods and crops on a farm, "and also all the tenant right and interest yet to come and unexpired of the debtor, in trust, to sell and pay a debt, and the residue to the debtor," passes away-going crops sown after the execution of the bill of sale. *Patch v. Tutin, 15 L. J., Ex., 280.*

When a bill of sale assigned property "particularly enumerated and described in a certain schedule hereunto annexed," it was held that, although the schedule was inadmissible, not being annexed to the bill of sale, yet that the bill of sale was admissible without the schedule. *Dyer v. Green, 16 L. J. Ex., 239.*

By assignees of bankrupts.]—The stat. 6 Geo. IV., c. 16, s. 72, enacts that if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors.

By stat. 2 & 3 Vict., c. 11, s. 12, all conveyances by any bankrupt *bona fide* made before the date and issuing of the fiat shall be valid, notwithstanding any prior act of bankruptcy, provided the person to whom such bankrupt so conveyed, had not at the time of such conveyance notice of any prior act of bankruptcy; and by s. 13 of the same Act, no purchase from any bankrupt *bona fide* and for valuable consideration, where the purchaser had notice at the time of purchase of an act of bankruptcy, shall be impeached by reason

thereof, unless the commission shall have been sued out within twelve calendar months after such act of bankruptcy; and by 2 & 3 Vict., c. 29, all contracts, dealings, and transactions, by and with any bankrupt, really and *bona fide* made before the date and issuing of the fiat, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of such bankruptcy by such bankrupt committed; provided the person so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have been issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy; provided also, that nothing herein contained shall be deemed to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.



ADDENDA.

JURISDICTION.

SINCE the former part of this work went to press, an important decision has occurred in the Court of Exchequer, in the case of *Grimbly v. Aykroyd*, ante, p. 46, as to splitting demands so as to bring them within the jurisdiction of the County Court.

The following is the judgment of the Court, as reported in the *Law Journal*, vol. xvii., *Ex.*, p. 160:—

"*Pollock, C. B.*—In this case a prohibition to the Judge of the County Court of Worcestershire was moved for; a rule *nisi* granted; and cause shewn in the last term before my brothers, Parke, Alderson, Platt, and myself. It appeared from the affidavit that, on the 17th of September last, 228 summonses were issued out of the County Court, at the suit of the plaintiff Grimbly against the defendant, for sums amounting in the aggregate to 303*l.* 19*s.*, one claim only amounting to the sum of 5*l.*, and many to less than 20*s.* These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons, who were sub-contractors with the defendant. Tickets appear to have been given by the sub-contractors, and signed by them, each for a certain amount, and those tickets amounted to 3,000; but actions were brought not for each supply, but apparently each for the amount of all the supplies to one workman. The defendant's affidavit denies all liability to these demands, on the ground that he never gave the order, or if he did, that he was not primarily liable, but only as on a guarantee, and the order was not in writing. But for the purpose of the present decision this is wholly immaterial, the question being whether, on the assumption that he was indebted, the County Court had jurisdiction. This depends upon the true construction of the Small Debts Act, 9 & 10 Vict., c. 95, particularly sect. 63, and not upon the old rule of the common law, as to the jurisdiction of the County Court. It will be proper, however, to consider what that rule was, in order to give a construction to the County Court Act. At common law, the County Court held no plea of debt or damages to the *value of* 40*s.* or above; 4

Inst., 286. "*Placita de catallis debitis, &c., quæ summam 40s., attingunt vel cum excedunt sine brevi regis placitari non debent*," 2 *Inst.*, 302; and if an entire contract or debt of 40s. or upwards was severed into sums below 40s., a prohibition was granted; *Roll Abr. 'Prohibition,'* 317; and without saying that the debt arose in an entire contract; *Fitzherbert*, in his *Nat. Brev.*, 46, lays it down, that if a man do owe unto another man five marks, and he sue several plaints for the same in the County Court, or any other Court (meaning no doubt the Hundred Court or Court Baron) against the debtor, he shall have prohibition thereof, and reverse the matter, and that it would defraud the King's Court of its jurisdiction. This doctrine was applied to contracts made at different times between the same persons, for several sums each less than 40s., but put together amounting to more, in an *anon. case* in 1 *Ventris*, 65, and in *Girling v. Alders*, reported in 2 *Keb.*, 617, by the name of *Girling v. Aldas*, which was for the price of different parcels of malt, sold at different times; 'because, though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued in the Court above, and not put the defendant to an unnecessary vexation, no more than he can split an entire debt into divers, to give the inferior court jurisdiction *in fraudem legis*.' The reason there given is a very satisfactory one, for it would be extremely vexatious if a plaintiff, from whom goods had been purchased in small quantities, at small prices, at different times, and by distinct contracts, either payable immediately or on credit which had expired, instead of uniting all in one action, which he could do after the debts were all due, should divide them into several and sue for each in a separate action in the County Court, which would give no adequate relief by consolidating them, in the exercise of their equitable jurisdiction (if they had any), as a superior court would; for they could not unite them, so as in the aggregate, to exceed or be equal to 40s. The extent to which that vexation might be carried, may be illustrated by the present case, in which it is sworn that there were 3,000 different tickets, and consequently 3,000 different items or separate contracts. It is true, indeed, that when each contract was due in cash, the creditor might, in the absence of any express or implied contract to the contrary, immediately sue for it; but when several debts had become due, he could unite them in one count in debt, or simple contract in *indebitatus assumpsit* as one entire debt; and there seems no good reason why he should not. In the subsequent case of *The King v. The*

Sheriff of Herefordshire, the judgment of Lord Tenterden, that to bring a case within the rule of law which forbids splitting, the cause of action must be one and *entire*, is at variance with the law laid down in the above cited authorities. The case itself may be distinguished, because there the debts were treated as being entirely distinct and separate from each other, the one having no connexion with the other; but in the case of a running bill with a tradesman, the items are generally connected, the first contract being usually made with the understanding that if not paid for until after others have been made, it is to form part of the same debt, so that several items are to be united into one bill. But the result of the decision altogether is to render it impossible to rely on the authority of the former cases, which otherwise would have disposed of the present question, supposing it to be decided by the rule of common law. The present case, however, does not depend upon these authorities, but on the construction of the recent Act, 9 & 10 Vict., c. 95. By the 58th section the new Court has jurisdiction in all pleas of personal actions when the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise. This clause was probably introduced in consequence of the provisions in some of the Court of Requests' Acts, that the Act should not extend to any debt for the balance of an account originally exceeding a given sum; see *Porter v. Philpot*. Be that as it may, it cannot be doubted that the clause was meant to give jurisdiction when the debt claimed consisted of various items, either together originally not exceeding 20*l.* at the time of the suit, or being reduced to that amount by payments, or in allowed set-off of other sums. We are next to consider the 63rd section, and the whole question turns upon the meaning of the term 'cause of action' in that section. It is provided that it shall not be lawful to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts; but any plaintiff having cause of action for more than 20*l.* for which a plaint might be entered under this Act, if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly. What then is the construction of the term 'cause of action'? The term 'debt or damage' is not used as it is in the passage above cited from 4th Inst., 266, but the more extensive term adopted

is 'cause of action.' This term does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts, contracted at different times, and in by far the greater number of cases a count in *indebitatus assumpsit*, or debt, is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Fawcett*, and one count may be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided would be unnecessary and surplusage; and though an argument that a clause in an Act of Parliament, if understood in one sense would be inoperative, in another operative, is not by any means a conclusive one, because it must be admitted that clauses are often introduced *ex abundanti cautela*, yet it is of some weight; and the probability is that the Legislature, in enacting that a cause of action should not be divided, meant a cause of action which but for the enactment would be divisible; and when it is considered to what abuses the narrower construction of this term would lead (which is strongly exemplified in the present case, in which 228 actions have been commenced, and 3,000 might have been brought), we think that we may safely conclude that the term 'cause of action' ought to be interpreted *cause of one action*, and not be limited to an action on one separate contract. But, on the other hand, if the term is to comprise all debts that might be included in one count, debts for work and labour, goods sold, use and occupation, though totally unconnected with each other, which might be included in one *indebitatus* count, would be prevented from being divided under this clause; and if indivisible, and the creditor brought an action for any part, he would virtually abandon all the remainder by the operation of the latter part of the 63d section. In such a case Mr. Justice Coleridge held, that a similar clause in the Brighton Court of Requests' Act (3 & 4 Vict., c. x., s. 24), did not apply; the demand there being for three distinct things, a house sold, for rent, and for goods sold, but he made a distinction between that case and one where a debtor has a bill running from day to day; *Neale v. Ellis*. In such a case, though each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due, the tradesman could sue for one item, yet the understanding is, undoubtedly, that it shall be united with other items and form one entire demand; and, doubtless, if after several other items were added to the first, the tradesman were to bring separate actions for each as for a distinct debt, any superior court would deal

with such a proceeding as vexatious. It appears, then, that a great inconvenience would follow if the term 'cause of action' were interpreted to mean cause of action on one separate contract, and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus* count, which according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter; and we think that we ought to hold that the 63rd clause does apply (whether to all debts which could be comprised in one description in one count, as for 'goods sold,' or not, we need not now decide), but at all events to the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another, and form one entire demand. If that demand exceeds 20*l.* it ceases to be within the jurisdiction of the County Court Act; and therefore, we think that on the facts disclosed in the affidavits before us, all the debts claimed fall within that description, the total greatly exceeding 20*l.*, and consequently they ought not to have been separated into different suits. Whether if the total had only amounted to 20*l.*, and the items then been separated and sued for by separate complaints, the total being within the jurisdiction of the County Court, which then could have given adequate relief, the suits could have been prohibited, is a question which need not now be discussed. But when the total exceeds that amount, and justice cannot be done in the County Court, we think that that Court has no jurisdiction, and a prohibition ought to go.

INSOLVENCY.

The Court of Exchequer has decided, notwithstanding the case of *Toomer v. Gingell* (*ante*, p. 101), that a final order under the 7 & 8 Vict., c. 96, is a bar to an action, and that that statute does not repeal the 10th section of the 5 & 6 Vict., c. 116. *Platel v. Bevil, and Jacobs v. Hyde, Exchequer, Trinity Term, 1848.*

BILLS OF EXCHANGE.

The doubt as to the jurisdiction of the County Courts in actions on bills of exchange, mentioned in a note to p. 224, has been removed by the case of *Nind v. Rhodes* in the Queen's Bench, reported in 17 *L. J., Q. B.*, 179, which decides that the County Courts have jurisdiction in actions on negotiable instruments in the same manner as in other actions.

FINIS.

INDEX.

- ACCEPTANCE of Goods within the Statute of Frauds, 5.
 of bill, proof of, 225.
- Accommodation note, defence of, 215, 222.
- Accord and satisfaction, defence of to action on promissory note, 217.
- Account stated, 12, 208.
- Acknowledgment, mere, insufficient ratification by infant, 33;
 to take cases out of Statute of Limitations, 78.
- Action, defence of another pending, 95.
- Actions, in what court has jurisdiction, 1; forms of, abolished in
 County Courts, 1.
- Admissions, evidence of, 10; proof of warranty by, 162.
- Administration, action by, 131; against, 133.
- Agent, payment to, 57; action for goods delivered by, 107;
 action for goods supplied to, 110, 112; signature by, 149, 211;
 action for money received by, 199; acceptance of bill by, 225;
 lien on goods entrusted to, 267.
- Agreement, if in writing must be produced, 16; cannot be
 varied by parol evidence, 16; alteration of, 18; may be
 explained, 18.
- Alteration of note, defence of, 214; of bill, 228.
- Animals, liability of keeper of, 249, 274.
- Apothecaries, actions by, 190.
- Assault, action for, 237.
- Assets, proof of in action against administrator, &c., 133;
 defence of want of, in action for distributive share or legacy,
 267.
- Assignees of Bankrupts, actions by, 140; of Insolvents' actions
 by, 143; cannot sue for personal labour of bankrupt, 182;
 title to goods, 258; claim by to goods taken in execution, 304.
- Assignment, claim to goods under, 298.
- Attesting witness, must be called, 27, 209.
- Attorney, action by for bill, 192; liability of to action for false
 imprisonment, 244.
- Auctioneer, contract by, 149; money paid to, 202.
- BAILERS, actions for negligence by, 274.
- Balance of partnership account, action for, 205.

- Bankruptcy**, of defendant, defence of, 96, 220; of plaintiff, 102; to actions of tort, 253.
Bankrupts, action by, 182; action by assignees of, 140.
Bargain and sale, proof of, under Statute of Frauds, 146.
Bequest, *see* "Devisee."
Bills of Exchange, actions on, 224—233; defence of payment by, 54; jurisdiction in actions on, 312.
Bought and sold note, proof of contract by, 150.
Broker, contract by, 149.
- CARRIER**, action for goods, delivered to, 112; lien of, 267; liability of for negligence, 276.
Cause of action, jurisdiction of courts, where divided, 45, 307.
Certificate, *see* "Bankruptcy."
 Apothecary's certificate, proof of, 191.
Chastisement, defence of in action for assault, &c., 241.
Cheque, action on, 233.
 — defence of payment by, 51.
Company, liability of members of, 114.
Composition with creditors, defence of, 91.
Condition precedent, performance of, 151, 156, 175.
Conditional acceptance, 227.
Consideration, proof of, for warranty, 163; defence of want of, to action on promissory note, 214; to bill of exchange, 229; failure of consideration, 229.
Contract, actions on, 3—236; implied, 3, 169; proof of written, 14; under Statute of Frauds, 147; special contract for work, &c., 183; contract for hiring, 185.
Contribution, action for, 197.
Conversion, proof of, in action for detaining goods, 255, 259.
Conviction, by Justice, plea of to action for assault, 241.
Coverture, defence of, 34, 216; proof of, 36.
Credit not expired, defence of, 43, 216.
Creditors, composition with, defence of, 91.
Criminal conversation, court no jurisdiction in action for, 1.
- DAMAGE Feasant**, justification in replevin, of seizure of cattle, 286.
Damages, proof of, 154, 156, 160, 238, 264.
Dangerous animals, liability of keeper of, 249.
Debts, outstanding, defence of, in action against administrator, &c., 137.
Defence, in general, 29 to 107; notice of, in what cases, 31, 72.
Delivery, of goods, proof of, 4; by third parties, 107; to third parties, 110.
Detention of goods, action on contract for, 166.
Devise, or bequest, County Court no jurisdiction where validity of in dispute, 1, 207.
Discharge of servant by magistrates, defence of, 189; discharge of assault by, 241.

- Dishonour of bill, proof of notice of, 232.
 Distrain, authority to, 284.
 Distress, defence of, to action for rent, 179; in actions of replevin, 283.
 Distributive share, action for, 205, 206.
 District, defence that cause of action did not arise within, &c., 48.
 Drawer *v.* Acceptor of bill, action by, 232.
 Drawing of bill, proof of, 232.
 Driving, *see* "Negligence."

 EARNST, or part payment, to take case out of Statute of Frauds, 147.
 Ejectment, County Court no jurisdiction in, 1.
 Eviction, defence of, to action for rent, 178.
 Executor, action by, 131; action against, 133. *Executor de son tort*, 133.

 FALSE IMPRISONMENT, action for, 242.
 Fraud, defence of, 38, 215.
 Frauds, statute of, 5, 146.

 Goods, sold and delivered, 3 to 145.
 ——— bargained and sold, 145 to 157. Action for not accepting, 154; for not delivering, 155.
 ——— defence of return of, 29, 152.
 ——— action for breach of warranty of, 157.
 ——— action of contract to recover, 166.
 ——— action for the use of, 167.
 ——— action of tort for taking, 250; for detaining, 254.
 ——— claim to taken in execution, 296, 298.
 Guarantees, action on, 234.

 HANDWRITING, proof of, 22; where signature attested, 209.
 Hearsay evidence inadmissible, 10.
 Hiring, proof of, in action for wages, 185.
 Horses, warranty of, 160; liability of rider of unruly, 246.
 Husband, liability of for wife's contracts, 122.

 ILLEGALITY, of contract, defence of, 39, 179, 195, 216. Contracts void at common law, 39; by statute, 40.
 Imprisonment, action for false, 242.
 Indorsee *v.* Maker of promissory note, action by, 221.
 ——— *v.* Indorser " " 223. Indorsee
 v. Acceptor of bill, 231. Indorsee *v.* Drawer, 233. Indorsee
 v. Indorser, 233.
 Infancy, defence of, 30, 166, 216; proof of, 32.
 Infant, liability of parent for goods supplied to, 130.
 Injuries to the person, action for, 237 to 250. Injuries to property, 250 to 281.

- Innkeepers**, liability of, for negligence, 280.
Insolvency, of defendant, defence of, 99, 220, 311 ; of plaintiff, 104.
Intentional injuries, action for, 237.
Interest, action for, 234 ; recovery of, in action for goods, 14.
Interpleader claims, 296.
Intestate, action by administrator for goods supplied by, 131 ; for goods supplied to, 133.
Intoxication, defence of to action on promissory note, 215.
I. O. U., evidence in action for money lent, 195.
- JUDGMENT** recovered, defence of, 94, 269, 296.
Jurisdiction of County Courts, 1 ; defence, of want of, 45, 307, 312.
Justice of the Peace, *see* "Magistrate."
Justification of assault, 240.
- LANDLORD**, evidence for in action for rent, 168 ; denial of title, 174, 294 ; liability of for negligence, 246 ; recovery of tenements by, 288 ; claim by, on interpleader summons, 297.
Lease, action for rent on, 168.
Legacy, action for, 206.
Libel or slander—Court no jurisdiction in actions for, 1.
Lien, defence of, to action for detaining goods, 264.
Limitations, Statute of, defence of, 77 ; in action against executor, &c., 136 ; in action for rent, 179 ; in action on promissory note, 218, 223 ; in actions for recovery of goods, 269.
- MALICIOUS** prosecution—Court no jurisdiction in action for, 1.
Magistrate, discharge of servant by, 189 ; conviction or discharge of assault by, 241 ; liability of, for acts, 244 ; notice of action to, 245.
Marriage, breach of promise of—Court no jurisdiction in action for, 1 ; proof of, 36 ; liability of husband for goods supplied to wife before marriage, 129.
Memorandum, proof of contract by, 15 ; in writing, under Statute of Frauds, 147.
Misconduct of servant, defence of, to action for wages, 188.
Mistake, money paid under, action for, 202.
Money, actions on contracts relating to, 193 to 208.
 — lent, action for, 193.
 — paid, 195.
 — paid and received, 199 ; tender of money, 66, 67.
- NECESSARIES**, what are or are not for infants, 31.
Negligence, actions for injuries to the person, from 246 ; to property, 271.
Negligent driving, injuries to the person from, 247 ; to property, 271.
Note, in writing, under Statute of Frauds, 147 ; *see* "Promissory Note."

Notice of action, when necessary, 245.

——— of defence, *see* "Defence."

——— of dishonour, 232.

——— to quit, 290; waiver of 295.

OCCUPATION of premises, *see* "Rent."

PAROL or verbal agreement, proof of, 3.

——— evidence, blanks in written agreement may be supplied by, 21; when written agreement in hands of opposite party, 27; when lost, 28.

Particulars of demand, 13, 238.

——— of set-off, 76.

Parties, are competent witnesses, 9.

Partners, action for goods sold *by* one of two or more, 110; action for goods sold *to*, 116; signature of promissory note, *by*, 211; acceptance of bill, *by*, 228.

Partnership, proof of, 38, 121; defence of, between plaintiff and defendant, 38, 217; defence that plaintiff has partners, 44; action for balance of partnership account, 205.

Pawnbroker, liability of, in respect to goods, 265.

Payee *v.* Maker of Promissory Note, action *by*, 209.

——— *v.* Acceptor of Bill of Exchange, 225.

——— *v.* Drawer of Bill of Exchange, 232.

Payment, defence of, 50; to action on note, 217; proof of, 61, 190; payment to agent, 108; proof of, in action for money paid, 195.

——— into Court, 106, 218; in actions of Tort, 242; part payment insufficient to render infant liable, 33; to take case out of Statute of Limitations, 87, 219; to take case out of Statute of Frauds, 147; payment of debts, defence in action against executor, *by*, 136.

Person, action for injuries to the, 237.

Personal actions—County Court jurisdiction, *in*, 1.

——— services, actions relating to, 179 to 193.

Physician, cannot maintain action, 192.

Plaintiffs may be examined, 9.

Possession, justification of assault, in defence of, 240; proof of possession of goods, 251; possession of tenements, recovery of, 288.

Post, payment through, 561

Presentment of promissory note, 212; of bill of exchange, 232.

Presumptions in evidence, 28, 37.

Price of goods, proof of, 9; above £10 under the Statute of Frauds, 147.

——— of work, 183.

Principal, *see* "Agent."

Privilege, defence of, 49.

Proceedings to recover possession of tenements, 288.

Promissory notes, actions on, 209 to 233.

Promise, by infant, 33; to take case out of Statute of Limitations, 78.

——— by bankrupt, 97; by executor or administrator, 139.

Property, actions for injuries to, 250 to 281.

Provisional committeeman, liability of, 115.

QUANTUM MERUIT, when plaintiff entitled to sue on, 183, 184.

Qualified acceptance, 227.

RECEIPTS, proof of payment, by, 62; stamp on, 62, warranty in, 163.

Release, of demand, defence of, 90; proof of, 94.

Rent, action for, 168; defence of distress for, in actions of replevin, 283.

Replevin, actions of, 282.

Retainer, of assets, by executor, 137.

——— proof of, in action by attorney, 192.

SECONDARY evidence, 27.

Security, defence of higher security given for debt, 94.

Securities for money, actions on, 209 to 236.

Seduction—Court no jurisdiction in action for, 1.

Servant, action for goods supplied to, 110; warranty by, 162; action for wages by, 185.

Service of summons on tenant, 294.

Sett-off, defence of, 72, 190; proof of, 76; set-off in actions for goods supplied by agent, 109; set-off by executor, 136; against action by assignees of bankrupts, 142.

Shareholders, liability of, 114.

Signature of contract under Statute of Frauds, 148.

Skill, defence of, want of, to action by surgeon, &c., 192; actions for want of, *see* "Negligence."

Splitting of demands, 45, 307.

Spirituous liquors, defence of illegal contract for sale of, 41.

Stakeholder, action for money had and received, against, 201.

Stamp, instrument must be duly stamped, 16, 21; stamp on receipts, 62; not necessary on acknowledgment to take case out of Statute of Limitations, 84; defence of, want of, on promissory note, 213.

Stoppage in transitu, 269.

Sunday, illegal sales on, 42.

Surgeons, actions by, 190.

Surrender of premises, defence of, in action for rent, 177.

TENANCY, proof of, in justification of distress for rent, 283; in proceedings to recover possession of tenements, 289.

Tenant, defence by, in action for rent, 174; cannot dispute landlord's title, 174; liability of for negligence, 246.

Tender, defence of, 65, 218; of rent, 285; of amends for cattle damage feasant, 287.

- Tenements, proceedings to recover possession of, 288.
Testator, action by executor for goods supplied by, 131; for goods supplied to, 133.
Title, County Court no jurisdiction when in dispute, 1, 207; defence that title is in dispute, 50, 285; denial of landlord's title, 174, 294.
—— to goods, proof of, 255.
Torts, actions for, 237 to 281.
Tresspass for taking goods, action for, 250.

UNSOUNDNESS in horses, what is, 163.
Use and occupation, *see* "Rent."

WAGER, *see* "Stakeholder."
Wages, action for, 185.
Warranty, action for breach of, 157; of horses, 160.
Wife is a competent witness, 9; delivery of goods to, 122.
Wilful or intentional injuries, action for, 237, 269.
Witness, who is competent, 9; attesting witness must be called, 27, 209.
Work and labour, action for, 179.
Written agreement, proof of, 14; under Statute of Frauds, 147.
—— acknowledgment, to take case out of Statute of Limitations, 78.

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